Indiana Law Review

Volume 29 No. 4 1996

TRIBUTES

Helen Garfield *Tribute by Mary Harter Mitchell*

Ronald L. Polston *Tribute by William F. Harvey*

1995 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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The Justification of Physician-Assisted Deaths
Tom L. Beauchamp

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The Golden Anniversary of the Choice of Law Revolution: Indiana Fired the First Shot
Geri J. Yonover

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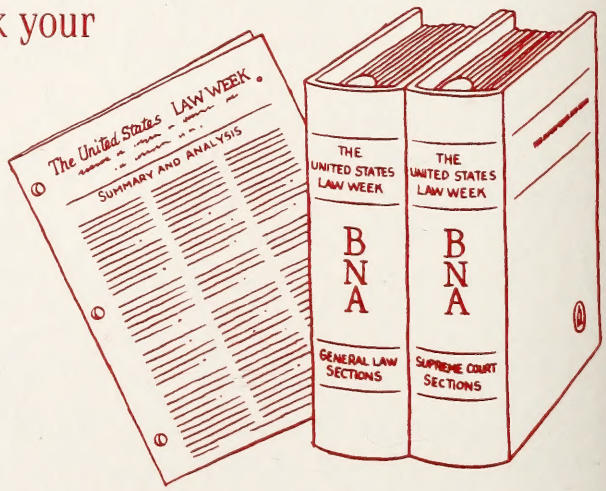
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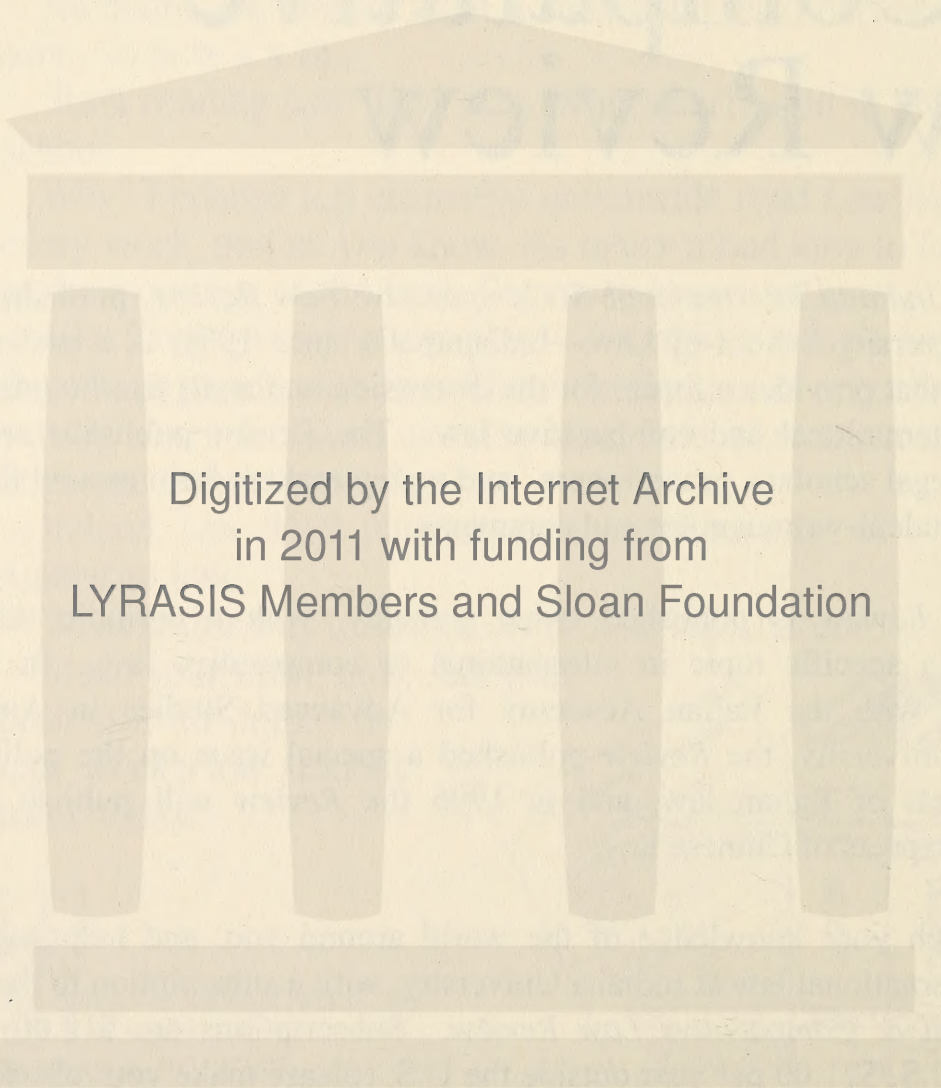
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HELEN GARFIELD TRIBUTE

MARY HARTER MITCHELL*

Due gratitude is a sign of right relation with the past. A theme of gratitude is most appropriate, therefore, for a tribute to a colleague who retired during our law school's celebration of its centenary year. The purpose of this Essay is to recognize an immense gratitude to Helen Garfield felt by her students and colleagues, and to record some achievements of her career in order to prompt more widely shared gratitude for the increment that this career adds to the life of this law school and of the law.

Helen Garfield earned her undergraduate degree in journalism at Northwestern University and her law degree at the University of Colorado, where she was honored with membership in the Order of the Coif. After law school she was admitted to the Bar in Colorado and served as Clerk for the Honorable Edward E. Pringle of the Colorado Supreme Court. Before coming to Indianapolis she practiced law in Boulder, Colorado, and taught at the Oklahoma City University School of Law. Garfield came to the Indiana University School of Law at Indianapolis in 1976 and taught here nineteen years, retiring in 1995. While at this law school she taught Constitutional Law, First Amendment, Fourteenth Amendment, Sex Discrimination, Family Law, Contracts, Corporations, and Legal Research and Writing.

Garfield's colleagues recall especially her reasonableness, her integrity, and her sense of humor—which could, when necessary, be pointed, but more often served to alleviate a tense moment or simply for fun. We also recall (and will miss!) her renowned roast beef dinner, served by unfailing tradition at faculty holiday parties. Helen Garfield was also a mentor for junior colleagues, especially newer women like myself, to whom she generously and unpretentiously offered her guidance and concern. Many of us also have been encouraged by the example of the roundedness of her life, for she is a scholar with devotion to family, a writer of both formal legal analysis and broad-humored Western melodramas, a feminist known for her intellect and charm, her scholarship and her roast beef dinners! She takes her work seriously and herself lightly, a valued quality in a faculty colleague.

Helen Garfield is a distinguished legal scholar whose rigorous analysis and fine prose have lifted worthy themes. Characteristically, Garfield contends for the rights of individuals against majorities. In this vein, her critique of Justice Bork's views of constitutional interpretation remains (when will it not be?) timely: "[m]ajoritarianism," she reminds, "is the *means*, not the end, and liberty . . . is . . . the end as well as the means."[1]

In addition, her writing both advocates and exemplifies an ideal of legal theory that "takes account of reality,"[2] that assesses justice by its realization, not in rules

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1. Helen Garfield, *Twentieth Century Jeffersonian: Brandeis, Freedom of Speech, and the Republican Revival*, 69 ORE. L. REV. 527, 568 (1990).

2. Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 321 (1987).

abstracted from historical, social, and economic facts, but in particular lives and a particular history. This insistence on contextualized and grounded justice is, of course, a prime point of feminist legal theory, and Garfield's writing typically makes this point. For example, she criticized Indiana's new marriage dissolution law because its newly imposed *abstract* equality amounted *in reality* to harsh inequality for homemakers who had married many years earlier when laws and expectations were different.

Still another theme of Garfield's writing is her belief that law can be called to be higher and that law's reformation can be effectual to improve society. This story is told of Phillip II, king of Macedon and a notorious drinker:

> Once when drunk he gave an unjust verdict in the case of a woman who was being tried before him. "I appeal!" cried the unfortunate litigant. "To whom?" asked the monarch, who was also the highest tribunal in the land. "From Philip drunk to Philip sober," was the bold reply. The king, somewhat taken aback, gave the case further consideration.[3]

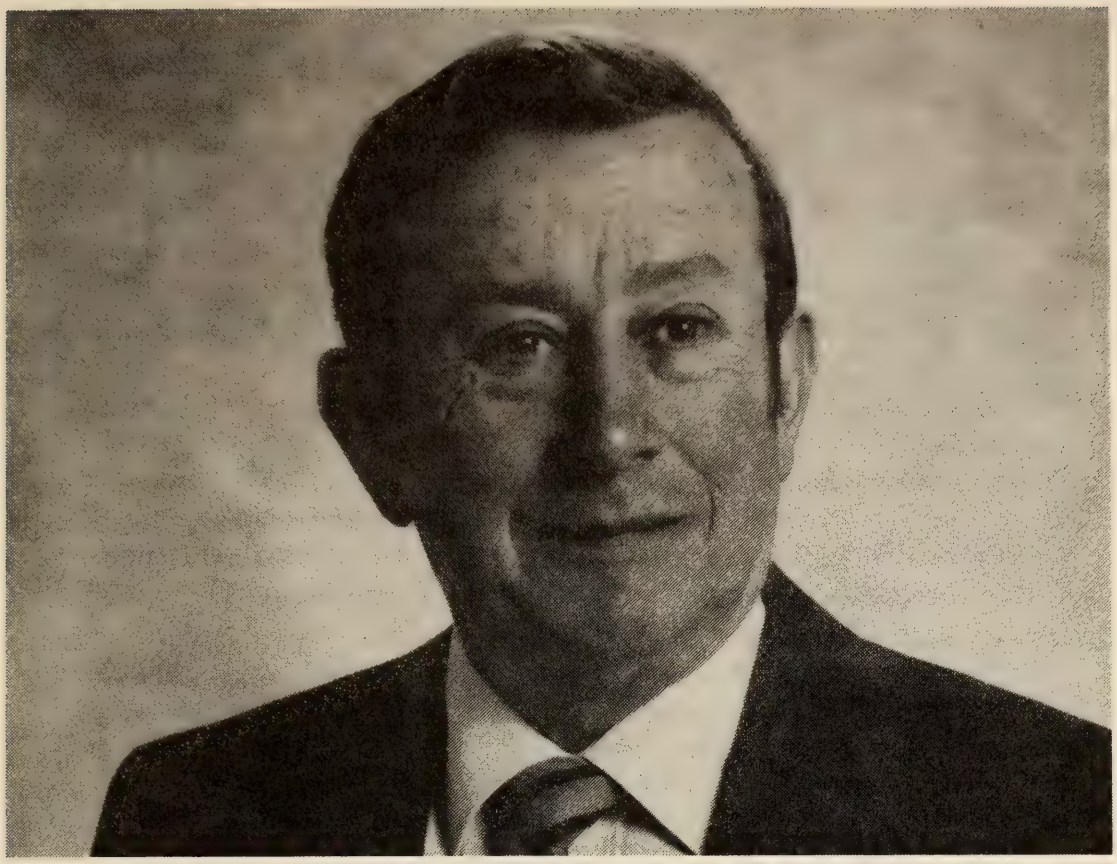
In her field of expertise, Constitutional Law, where the Supreme Court's word may be taken in some sense as the final word, Garfield does not hesitate to appeal "from Philip drunk to Philip sober."

Given these themes in Garfield's own work, one is not surprised at her interest in Louis Brandeis: legal scholar and Supreme Court Justice, creative champion of reform, early articulator of the individual's right to privacy, advocate of replacing formalist legal doctrine with law that takes account of social and economic realities, "[p]rogressive to the core."[4] Garfield has written approvingly of his "lifelong concern with the values of privacy and autonomy"[5]—a phrase aptly applied to herself as well. Garfield's recent completion of a biography of Brandeis represents an impressive culmination and recapitulation of her rich scholarly life.

As Helen Garfield enters retirement, we congratulate her, literally we are grateful with her, for both her time among us and her time ahead.

---

3. THE LITTLE, BROWN BOOK OF ANECDOTES 449 (Clifton Fadiman ed., 1985).
4. KERMIT L. HALL, THE MAGIC MIRROR—LAW IN AMERICAN HISTORY 224 (1989).
5. Garfield, *supra* note 2, at 297.



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Employment:

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1964-65,	Partner, Craig & Craig, Mount Vernon, Illinois.
1965-68,	Assistant Professor, Indiana University School of Law—Indianapolis.
1968-71,	Assistant Dean, Indiana University School of Law—Indianapolis.
1968-72,	Associate Professor, Indiana University School of Law—Indianapolis.
1972-95,	Professor, Indiana University School of Law—Indianapolis.
1972-73,	Visiting Professor, Monash University, Faculty of Law, Melbourne, Victoria, Australia.
1993,	Lecturer, China University of Political Science & Law, Beijing, P.R.C.; Lecturer, N.W. China Inst. of Political Science & Law, Xian, P.R.C.
1995,	Professor Emeritus, Indiana University School of Law—Indianapolis.

Subjects Taught:

Constitutional Law, Contracts, Conflicts of Laws, Oil and Gas, Property.

Bibliography:

As a Student:

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The Fixtures Doctrine: Was it Ever Really the Law?, 16 WHITTIER L. REV. 455 (1995).

The History of the Indiana University School of Law, Indianapolis, 28 IND. L. REV. 455 (1995).

Current Issues in American Contracts Law, 1 FOREIGN L. TRANSLATION & REV. 70 (Institute of Law, Chinese Academy of Social Sciences, Beijing, P.R.C. 1995) (published in Chinese).

PROFESSOR RONALD W. POLSTON BIOGRAPHICAL SKETCH

Ronald Wayne Polston was born in Raymond, Illinois, November 1, 1931, the son of Joseph Marion Polston and Minnie Wilson Polston. After graduation from the Raymond Schools in 1949, he obtained his B.S. degree from Eastern Illinois University in 1953, and then spent the next two years in the United States Army as a draftee during the Korean War. Upon return from the Army he attended the University of Illinois College of Law, obtaining an LL.B. in 1958.

During law school he was elected to the Board of Editors of the *Illinois Law Forum* (now the *Illinois Law Review*), and became Assistant Editor in his senior year. After graduation he became an Associate in the law firm of Craig & Craig in Mt. Vernon, Illinois. The one hundred year old firm had offices in both Mattoon and Mt. Vernon. Partnership was achieved in 1964. While in Mt. Vernon, he married Mary Ann Campbell, the daughter of Howard W. and Mildred Campbell. Mr. Campbell was the senior partner in the Mt. Vernon office of Craig & Craig.

In September of 1965, he left practice to join the faculty of Indiana University School of Law in Indianapolis, as an Assistant Professor. The subjects taught his first year were Property I and II, Conflicts of Laws, and Oil and Gas Law. Those courses remained his standard load through 30 years at the Law School. Oil and Gas Law has been his area of special interest, and the area in which most of his scholarly work appears. He was promoted to Associate Professor in 1968 and to Professor in 1972.

In 1967, when there was some doubt as to whether the Law School in Indianapolis would be allowed to commence a full time program and obtain autonomy from the Law School in Bloomington, he prepared a report for Elvis Stahr, the President of Indiana University, in which he outlined the need for a full time law school in Indianapolis. The president responded by authorizing the beginning of such a program in the 1969 school year. In the fall of 1968, he became Assistant Dean of the Law School and was charged with supervising the construction of the new Law School building, which had been authorized by the legislature in the previous year, and with organizing the full time program. During the next two years the new building was constructed, and furnished, and the full time program was inaugurated. The new building was completed in the fall of 1970 and at the request of Dean Cleon Foust, Assistant Dean Polston, remained in the administration for the next year to work out any problems in the new building and the newly begun full time program. He left the administration and returned to full time teaching in the fall of 1971.

In the 1969-70 school year, at the request of Michael Phillips, Speaker of the Indiana House of Representatives, he drafted the Indiana Dormant Minerals Act that was adopted by the legislature in 1970. The Act returns the ownership of severed mineral estates to the owner of the residual fee after twenty years of non-use of the mineral estate. The drafting of the Act is described in a law review article published in *The Land and Water Law Review* of the University of

Wyoming.[1] When the constitutionality of the Act was challenged he was engaged by the attorneys defending the Act to write the briefs in both the trial and appellate courts. The Act was upheld by the Indiana Supreme Court[2] and the United States Supreme Court.[3] The Act has since been the model for legislation in five other states.

In 1967, he and his wife adopted a daughter, Anne Campbell Polston, and in 1969, a son named Joseph Harrison Polston. During the 1972-73 school year, he took a sabbatical leave of absence and, with his family, spent the year in Melbourne, Australia, where he taught and studied at Monash University. While there he did research in the area of Australian mineral law and created a course, which he taught, called Australian Mining Law. During the course of that year the family went around the world; having traveled to Australia via Mexico, Tahiti, Fiji, and New Zealand, and returned via Bali, Singapore, Kuala Lumpur, Bangkok, Teheran, Athens, and Madrid.

Professor Polston served on all major Law School committees and served as Chair of most at various times. He also regularly attended the annual meetings of the Association of American Law Schools and the biennial meetings of Natural Resources Law Teachers sponsored jointly by the Eastern Mineral Law Foundation and the Rocky Mountain Mineral Law Foundation. In 1971, he served as Chair of the Faculty Appointments Committee of the Association of American Law Schools. Over the years he presented several programs for the Indiana Continuing Legal Education Forum in the mineral law area.

In the late 1960's, he volunteered to assist the newly organized National Attorneys Title Assurance Fund and was made a member of the Board of Advisers of that organization. The purpose of the organization is to preserve the role of the Indiana attorney in the real estate transaction. He served in that capacity for several years until the organization was restructured and he then became an officer in the new organization. He served in that capacity until his retirement at which time he resigned.

In 1986, he was asked to present a paper at the Annual Meeting of the Eastern Mineral Law Foundation in Pittsburgh. That began an association with that organization which resulted in the Law School becoming a governing member of the Foundation. Professor Polston represented the School as a Trustee of the Foundation until his retirement. During that time he presented papers at four of the annual meetings and those papers were published in the annual volumes for 1985, 1986, 1987, and 1991.[4]

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1. Ronald W. Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles*, VII LAND & WATER REV. 72 (1971).

2. Short v. Texaco, Inc., 406 N.E.2d 625 (1980).

3. Texaco, Inc. v. Short, 454 U.S. 516 (1982).

4. Ronald W. Polston, *Recent Developments in Oil and Gas Law,* 6 EASTERN MIN. L. FOUND. 19-1 (1985); Ronald W. Polston, *Recent Developments in Oil and Gas Law,* 7 EASTERN MIN. L. FOUND. 19-1 (1986); Ronald W. Polston, *Recent Developments in Oil and Gas Law,* 10 EASTERN MIN. L. FOUND. 19-1 (1987); Ronald W. Polston, *Redefining the Relationship Between the Surface Owner and the Mineral Developer*, 12 EASTERN MIN. L. FOUND. 22-1 (1991).

When the Law School began a China Summer Program in Shanghai in 1987, Professor Polston became active in the Program. In 1988, he served as the Director of the Program in Shanghai, and in 1989, he handled the administration of the Program while another member of the Faculty served as the resident Professor in Shanghai. In that year he also compiled the course book that has been used in the Program in the ensuing years. In the Spring Semester of 1993, he took a sabbatical leave of absence and spent the semester in China where he lectured at China University of Political Science and Law in Beijing, the Northwest China University of Political Science and Law, in Xian, the Southwest China Institute of Political Science and Law, in Chongqing, and East China University of Political Science and Law, in Shanghai. At the end of that semester he served as the resident Professor for the Summer Program. While in China, he wrote papers on American law subjects that were translated into Chinese and published in Chinese law reviews.[5]

As a result of his interest in China he was instrumental in establishing the Peter Ho Scholarship, which was funded by Peter Ho, an alum of the school. The scholarship has provided tuition for two Chinese students who have attended Indiana University School of Law at Indianapolis, Liu Ji-Qing and Zhang Yi. Both students were given their first year room and board at the Polston home free of charge.

In the fall of 1993, he and Professor William Harvey commenced the restoration of the graduating class composites of the predecessor Law Schools, doing the cleaning and reframing themselves at a local frame shop. In the process he conceived the idea of celebrating the Centennial of the Law School in the following year. A Centennial Committee was formed with Professor Polston as Chair. Many activities were held in the 1994-1995 school year, including a symposium of the *Indiana Law Review* on legal history. Professor Polston presented a paper on the history of the Law School that was published as part of the symposium.[6] When it was discovered that there were no graduating class composites for the years 1967 through 1979, he conceived the idea of asking the graduates of those years to send him photos of themselves to be used in creating composites for those years. From the photos received, and from some taken from the application files of students, such composites were created. In creating the missing composites, Professor Polston copied more than a thousand photographs using his twenty five year old camera and copy stand. They were developed and printed by the IUPUI Photography Department and formatted as composites by the Medical School Illustrations Department.

Professor Polston's last day on the Faculty of the Law School was spent in Shanghai on June 13, 1995, when he put the final touches on the Summer Program for that year. Upon his retirement he returned to his hometown to live in a house within a couple of blocks of the one in which he was born.

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5. Ronald W. Polston, *Fundamentals of American Conflict of Laws*, LAW REV. SOUTHWEST CHINA INST. POL. SCI. & L. 110 (1993); Ronald W. Polston, *Current Issues in American Property Law*, 3 FOREIGN L. TRANSLATION & REV. 64 (1994); Ronald W. Polston, *Current Issues in American Contracts Law*, 1 FOREIGN L. TRANSLATION & REV. 70 (1995).

6. Ronald W. Polston, *History of the Indiana University School of Law—Indianapolis*, 28 IND. L. REV. 161 (1995).

PROFESSOR RONALD W. POLSTON
A PERSONAL RECOLLECTION AND TRIBUTE

WILLIAM F. HARVEY*

Eight major institutional events occurred in the Indiana University Law School at Indianapolis in the 30 years before 1996. These are (1) reopening the Law School's day division. It was closed when Indiana University purchased the Indiana Law School in 1944. After an absence of twenty-five years, the day division reopened, and the Law School offered the only day and evening legal educational program in Indiana. (2) At about the same time, the Law School's alumni insisted upon the construction of the Law School's new building. It was occupied in 1970. (3) As a result, the Law School enrolled the largest law student body in the State of Indiana (by 1972, over 1100 students were enrolled). (4) An entirely independent Law School administration was established in Indianapolis. The School was no longer part of the Law School administration at Bloomington. (5) In 1975 the Law School in Indianapolis and the Law School in Bloomington were formally renamed as the Indiana University School of Law— Indianapolis, and the Indiana University School of Law—Bloomington. The Indianapolis Law School remained directly under Indiana University's administration in Bloomington until "IUPUI" was created in Indianapolis. (6) The University's President and the Trustees accepted the principle of "parity" in funding the Law Schools. This occurred as a result of the "Beesley Committee's"[1] recommendation

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1. The "Beesley Committee" was appointed by University President John W. Ryan, "to advise him on the utilization of Indiana University's resources for legal education." It convened on November 6, 1975, in the Conference Room at the Lilly Endowment, Inc., Indianapolis, Indiana. Its members were: Mr. Eugene N. Beesley, Committee Chairman (and Chairman of the Lilly Endowment), Mr. George B. Gavit, Indianapolis attorney with Ice Miller Donadio & Ryan (and the son of the late Dean Bernard C. Gavit of the Bloomington Law School. Dean Gavit was that Law School's dean when the Indiana Law School was purchased by Indiana University in 1944). Mr. Joe S. Hatfield, Evansville attorney, and senior partner of Fine, Hatfield, Sparrenberger & Fine (and the former President of the Indiana Bar Association), Mr. Robert A. Lucas, attorney (and a member of the Board of Trustees of Indiana University), the Honorable James E. Noland, United States District Court for the Southern District of Indiana, Mr. Millard H. Ruud, Executive Director of the Association of American Law Schools, the Honorable Richard M. Givan, Chief Justice of the Indiana Supreme Court, the Honorable John S. Hastings, United States Court of Appeals for the Seventh Circuit, Mr. Thomas S. Scanlon, attorney, and senior partner of Barnes, Hickam, Pantzer & Boyd, Indianapolis, Indiana, and Mr. Willard S. Boyd, President of the University of Iowa. The Committee took evidence from the Law School Deans, William F. Harvey, from Indianapolis, and Douglass G. Boshkoff, from Bloomington, and from their assistants, including Indianapolis Assistant Dean G. Kent Frandsen, selected third-year law students, and other persons. Among the recommendations made by the Beesley Committee, it said: "Each program should be encouraged to pursue its own method and approach to legal education and to capitalize on those institutions which add dimension to their existence. Parity in the distribution of financial resources is essential

in November 1975. (7) By 1979 the Law School had established the finest law library and legal collection in Indiana. The law library collection was among the top 25 in the United States.[2] It was Indiana's largest. (8) The remarkable history of the Law School and its equally remarkable alumni, too long forgotten or disregarded, was resurrected. This history demonstrates that the Indiana Law School opened in Indianapolis in 1894-95. Before that time it was, it seems, the Law School at DePauw University. This places the Law School's history to the time of the Civil War or before.

When thinking about a professor of law, a happy moment occurs when one knows that he teaches well, writes well, and dedicates himself to the legal education of his students. When the evidence of these achievements is in classes well taught and well received, in the professor's various legal publications that are well regarded and well accepted, and in court briefs or legislative enactment's that are effective and beneficial, then a measure is available. It provides an intellectually pleasant occasion and personal recollection.

Professor Ronald W. Polston taught well and he wrote well. He was well received by his students, alumni, and members of the legal profession. In these things he is distinguished.

In this Law School, he was much more. He was keenly aware of the essence of the institution where he worked and of which he was a part. He understood that a legal educational institution is defined by more than its curriculum, the persons who teach it, and the students who are taught. It is also defined by its institutional stability, its history, its alumni, the legal profession and the social community where it is found. They, too, give a law school shape, purpose, and function. They sustain it inside a large state organization called a university. A law school must have all of these assets and attributes, or there might not be a curriculum to teach or a student body to instruct.

This suggests that the division between the professional academic and the practicing profession, so often articulated and observed as if it were a clear divide, can create a vacuum that pulls some faculty and administrative persons into an isolating pursuit that leads to insulated chambers. Once there, they delight in notions of law and philosophy that give them, they believe, a superior status. This is recognized in their assertions that declare or infer an academic and social detachment from the daily realities of the profession and the administration of law. Arthur Koestler's reference to "the intellectual's estrangement from reality," describes the condition. Their intellectual existence becomes quite separate from the institution and the communities in which they live and work. They are in this world but they are not part of it. "*Question Reality*" is their automobile bumper sticker of choice.

These persons wallow in a belief that they are committed "to making a difference" or "to changing things" or "to making a better world with our

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to the enrichment of our State's legal development." *Report Of the Ryan Committee Of Special Consultants On Legal Education at Indiana University 3.*

2. This occurred during seven (7) years of dedicated effort and development. This history is beyond the scope of this discussion, but it is remarkable and it is an outstanding achievement.

policies," because "as idealists, we understand history, and we can change it." As far as law students are concerned, in this cosmic order a commitment to affirmative action actually means that the task of educating and preparing a law student to practice law is affirmatively avoided whenever possible. The art of teaching, the pursuit of constructive ideas, applied knowledge, academic ability, and contributions to the sustaining community have discounted importance except when offered as assurances to visiting alumni, legislators, parents, or prospective students. The widow who struggles in probate, the defaulted defendant who is lost in a clerk's office or in a small claims court, the mother whose child is maimed by the drunken driver, the owner of a mineral right that provides a meager income, are disregarded or disdained because any one of them would require a commitment of time and energy that must be allocated to universal goals and global achievements.

When these faculty or administrative persons retire or depart, charity intrudes. We tend to think about them as "le poete maudit." We see them as doomed poets and this allows their character to be brighter than it is or was. In deeper review, however, we might borrow from another poet and say that "Nothing in his or her time and career became this person like leaving it."

Professor Polston was cut from a different cloth. He esteems accomplishment that is attained by intellectual effort. He respects heritage and culture, and he studied American and Chinese heritage and culture in particular. He can weigh an idea and then decide whether it is superior to a different or contrary idea. He does not think that objectivity is deceitful or that the rule of law and legal standards are farcical. Therefore he understands and he sustains values, hierarchy, tradition, and social stability. His breadth of intellect and understanding are extraordinary. He studies history and persons affiliated with it. He does not believe that he is superior to history or to persons who are gone. Thus he can not join in a rationale for condemning history and superimposing a revision upon it, or upon persons in the social order who appear to be associated with or derive from a history that others now renounce.

He knows that every ideology of the future has a blood-soaked past. This ability allowed him to listen to the fulminations of arrogant historicism, while dedicating himself to understanding the widow's struggle in probate, the injured laborer's claim for compensation, the shareholder's concern about unproductive or wasteful management, or the child's need for support payments.

He was unique as a faculty member and as an assistant dean in the Law School. He understood the requirements of institutional development, in addition to the necessity of a faculty's applied function and theoretical development. He knew that each is necessary and that neither exists in an isolated condition. To this understanding he brought an unusual dimension into the academy and into this Law School. He was willing to act. He was willing to participate, to create, to construct, and to build. Moreover, he was willing to incur the substantial risks and barriers that can be placed before a faculty member, an assistant dean, or a dean, who brings these talents into a large university.

He developed the qualities of insight, energy, promptitude, and firmness. With these, and with limited use of the passive virtues of patience and tolerance, he did much more than make a breathless commitment "to change" or "to making

a difference" or some other kind of triumphal globalism. He actually constructed and he actually created. He was instrumental in both designing and administrating the curriculum of the Law School's day division, and he developed a comprehensive plan for integrating it with the evening division. This occurred over the instinctive objection of several persons then in the Law School's administration, but with the eventual approval of the University's president of that time. He carefully superintended the actual construction of the law school building that opened in 1970. He could do this because he knew as much about the design and the construction of a building (especially an academic building) as any person formally employed in the University as "the building expert." Because of this ability and his willingness to use it, the building has provided outstanding accommodation to faculty and students during the last twenty-six years.

He was there at the "new beginning" when the Law School established an autonomous administration, and he shared fully in the huge undertaking of providing excellent legal education to over 1100 law students who, a short time earlier, were fewer than 400. Throughout, and in the intervening years, he was supportive of other faculty, the library, and the students.

His understanding of Indiana's history is impressive. With this talent he was a major force in the discovery and resurrection of the Law School's brilliant history, and in its Centennial Celebration in 1995. This provides, perhaps, the best place for an observation. It is the place to observe the mark of the man and the measure of his commitment.

The year of his retirement from the faculty, the Law School, and the University was 1995. Probably this was his busiest year. In addition to a full teaching load and all regular faculty duties, he was totally committed to the resurrection and restoration of the Law School's history. He chaired the Centennial Committee that organized a Centennial celebration that extended throughout the year. He wrote an excellent piece in the *Indiana Law Review*[3] about the School's history. He (and I) repaired, repainted, and restored about sixty class and faculty pictures. They begin a year or two after the school opened in Indianapolis in 1894-95. Additionally, he personally solicited and obtained pictures of graduates in the graduating classes between 1964 and 1979 (of which there was none before his efforts) and mounted, named, and framed them.

The remarkable history of the Law School and its highly accomplished alumni was revived and placed in clear view. University faculty, administrators, students, and the general public may know that in 100 years the Law School produced two (2) Vice Presidents of the United States,[4] seven (7) United States Senators,[5] many

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3. Ronald W. Polston, *History of the Indiana University School of Law—Indianapolis,* 28 IND. L. REV. 161 (1995).

4. Vice President Charles Warren Fairbanks, 1905-1909, and Vice President J. Danforth Quayle, 1989-1992.

5. Charles Warren Fairbanks (Rep.) 1897-1904; John W. Kern (Dem.) 1911-1917 (Senator Fairbanks was an original faculty member of the Indiana Law School. Senator Kern was a faculty member of a school of law that merged with the Indiana Law School. He was a candidate for Vice President with William Jennings Bryan, and probably suggested that Mr. Bryan speak to the student

members of the Federal Judiciary, the Indiana Supreme Court, and the Indiana Court of Appeals, about one-third of the sitting Indiana trial judiciary, a Judge[6] in the Nuremberg War Crimes Trials in 1945-46, an attorney[7] who defended several of the major Japanese War Criminals in Tokyo at the same time, the Majority Leader of the United States Senate as the United States entered World War I,[8] and Members of the House of Representatives. There are Indiana Attorneys General, United States Attorneys and prosecuting attorneys, famous defense counsel, bar association presidents, and the senior partners of many Indiana law firms.

The Law School granted admission—before 1900 and after—to racial minorities (at that time it was not, of course, a Big Ten Law School. It is now and it is the only Big Ten Law School that did this—a bit of history that ought to arouse pride, appreciation, and serious historical research), and to women (in the 1920s, women composed 20 to 30 percent of several graduating classes and some classes had from 40 to 60 graduates) and admission to many other sons and daughters of hard-working parents—or persons referred to in these times as "the working class." Indeed, they did work, and how they did succeed! Only in America!

Professor Ron Polston and his small Centennial Committee were responsible for these discoveries and for permitting them to be known today.

He used his talents in full and active measure to the day he left. He is not a man who "went gently into that Good Night." He enjoys each day if he is exhaustively engaged in it and if, at its end, he can return to his lovely and gracious wife, Mary Ann, so they may together embrace and love their new grandchild.

Indiana University, its Law School at Indianapolis, and its faculty, students, and graduates are greatly enhanced because of Professor Ronald W. Polston and his years of teaching and work. I am very pleased to know him as a friend and as a colleague of many years.[9]

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body of the Law School, which he did at the School on February 17, 1908. It is a remarkable address. It is reprinted full text in William F. Harvey, *Fragments From Our Fleece: Vignettes From 100 Years in a Great Law School*, 28 IND. L. REV. 143, 145 (1995)); Arthur R. Robinson (Rep.) 1926-1934; Frederick Van Nuys (Dem.) 1932-1944; Samuel D. Jackson (Dem.) 1944; J. Danforth Quayle (Rep.) 1981-1989; Daniel R. Coats (Rep.) 1989-.

6. Judge Frank N. Richman, a member of the faculty of the Indiana Law School.

7. Professor Floyd J. Mattice, a member of the faculty of the Indiana Law School until shortly before the United States entered World War II.

8. United States Senator John W. Kern (Dem).

9. Several thoughts and statements that appear in this Tribute are refined after they came to me from other persons. Those I recall are the Honorable John A. Danaher, the Honorable (later Chief Justice) Warren E. Burger, then on the United States Court of Appeals for the District of Columbia Circuit, for whom I was employed or worked; the Honorable Robert H. Jackson, who thought and wrote as clearly about legal education as any person in the past 60 years; Mr. Joseph Sobran, Mr. Arnold Beichman, and Professor Ronald W. Polston.

WHY LAW REVIEW SURVEY ISSUES ARE A GOOD IDEA

RANDALL T. SHEPARD*

INTRODUCTION

On the several occasions that the editors of the *Indiana Law Review* have invited me to introduce their annual survey issue, I have always tried to do more than summarize the contents. Instead, I have used the moment to write about broad topics like lawyers and writing,[1] the state of the profession,[2] and the state of the Indiana Supreme Court.[3] These have been advantageous opportunities to place in print ideas about where we Indiana lawyers are heading.

In the course of preparing these introductions, however, I have sometimes reflected on the place of survey issues in the modern profession and in the modern law school. These editions are remarkable in many respects, a few of which I describe here.

I. THE PLACE OF SURVEY ISSUES

While there are relatively few quantitative measures of law journal activity in American law schools, it is plain for all to see that the number of journals is growing steadily and that most of this growth is occurring in specialized areas.[4] By definition, this expansion through specialization means that the amount of scholarship laying claim to the general interests of the mainstream legal profession has declined as a percentage of all new scholarship in print. The rise of specialized publishing likely bears some correspondence to the shift in law school curricula towards interdisciplinary and theoretical "law and . . ." courses, like law and economics, law and literature, and so on.

In any event, it barely takes mentioning to remind the reader what the average practitioner thinks about the general relevance of law journals. Lawyers use words like "arcane" and "narrow" to describe the writing which appears in so much of today's law school journals, authored almost entirely by professors and edited almost entirely by law students. "They're talking only to each other," practitioners say, with some justification. When you can find articles in print with

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*. Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia.

1. Randall T. Shepard, *On Lawyers and Writing: Pass the Constitutional Mustard, Please*, 28 IND. L. REV. 811 (1995).

2. Randall T. Shepard, *Lawyer-Bashing and the Challenge of a Sensible Response*, 27 IND. L. REV. 699 (1994).

3. Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

4. Ten years ago, for instance, the Indiana University law schools each published one general purpose law journal. Now, the school at Indianapolis also features the *Indiana International and Comparative Law Journal*, and the school at Bloomington is home to the *Indiana Journal of Global Legal Studies*, and the *Federal Communications Law Journal*.

titles such as "The Genesis of Russian Secured Transaction Law Before 1917,"[5] and "Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein,"[6] you can say with some confidence that the paradigm has shifted at the editors' desks in America's 179 accredited law schools. The trend toward publishing in narrow niches will surely continue, inasmuch as it reflects broader trends toward increased specialization in the academy. Would anybody like to argue the contrary before a jury of twelve lawyers chosen at random?

Let me say, not to be misunderstood, that I enjoy reading law journals and that I consider myself a better lawyer because of it. I appreciate keenly the hard work of authors laboring over the detailed writing required for journal publication and the grinding toil of the student editors who bring it all to press. I mention the current state of journal publishing not so much to lament it (indeed, I am not sure I do lament it) but rather to illuminate the setting in which the *1995 Survey of Recent Developments in Indiana Law* exists. Survey issues may have once been part of the mainstream of academic publishing. In the present day, however, the continued dedication of the *Indiana Law Review* to this project speaks volumes about the level-headedness of its leadership. They are swimming a little against the current. I think they are swimming in a good direction.

There are many ways of viewing the benefits flowing from the effort of producing this law review's survey issue, three of which I mention here.

II. THE SURVEY ISSUE AND THE PRACTITIONER

First, the survey issue is a way of speaking to practitioners about the fields of law that still bring the overwhelming majority of clients into lawyers' offices: tax, property, torts, business law, worker's compensation, and the like. In an age when publicity is so often focused on megafirms and legal boutiques, almost half of all American lawyers still practice in very small law firms.[7] Indeed, a third of all American lawyers in private practice are sole practitioners, and the proportion of sole practitioners appears to be rising.[8] The topics treated in this survey are the fields these lawyers traverse day to day to help clients with their legal problems.

Can practitioners find out about changes in case law, statutes, and regulations anywhere else? Of course they can, but there is absolutely nowhere else they can find it compiled and analyzed so comprehensively—and with so little investment of their own time.[9] Working lawyers both recognize and value this benefit. It is

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5. Konstantin Osipov, *The Genesis of Russian Secured Transaction Law Before 1917*, 42 CLEV. ST. L. REV. 641 (1994).

6. Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485 (1996).

7. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 36 (A.B.A. Section of Legal Education and Admissions to the Bar, 1992).

8. *Id.*

9. In the oft-quoted words of President Lincoln, "A lawyer's time and advice is his stock in trade."

not an accident that the legal update seminar held each fall that supplies its participants with a copy of this survey issue is frequently the largest continuing legal education event in Indiana each year.[10]

The survey issue also offers its review of the year in a way that constitutes more than "information." It provides synthesis of seemingly disparate developments by people who are recognized as the best in their fields. How could you do better than reading about the year in workers' compensation law as reviewed by the chair of the Indiana Workers' Compensation Board;[11] the year in tax by the state's leading tax professor;[12] or "who's voting with whom on the Supreme Court?" by the court's most prominent observer.[13] Authors brought together in the survey are people who know their field like the back of their hand and who devote dozens of hours to thinking and writing about the trends they observe.

Finally, the survey issue and the fall seminar, sponsored as it is by the law school's alumni association and the education arm of the state bar association, forge a stronger relationship between law faculty, students, and practitioners. Practitioners in many other states wish that such bonds existed in their venue.

III. The Survey Issue and the Authors

Second, in the course of developing this issue, the law review recruits a broader range of authors than ordinarily find their way into most law journal publishing. It recruits prominent judges,[14] lawyers from leading firms,[15] and counsel for the disciplinary commission,[16] to mention a few. Plainly this broader array of talent is in and of itself a bonus both to the law review and its' readers, and the breadth of vision attending its collection of viewpoints is stronger in its diversity than otherwise would be the case.

More subtly, engaging these practitioners and judges as writers may itself serve to move the law next year and the year after. It creates an occasion for people who shape the law to think formally about where it is headed. It sharpens

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10. The I.C.L.E.F. seminar routinely draws approximately 350-400 attendees. By contrast, the highly publicized program in which the flamboyant Johnnie Cochran lectured on jury selection just two months after the Simpson trial drew 133—including 15 complimentary attendees.

11. G. Terrence Coriden & Daniel Foote, *1994 Survey of Recent Developments in Worker's Compensation*, 28 IND. L. REV. 1141 (1995).

12. Lawrence A. Jegen, III & John R. Maley, *1994 Developments in Indiana Taxation*, 28 IND. L. REV. 1089 (1995).

13. Kevin W. Betz & Andrew T. Deibert, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1994*, 28 IND. L. REV. 853 (1995).

14. Gary L. Miller & Kelly Rota-Autry, *Recent Developments in Indiana Criminal Law and Procedure*, 28 IND. L. REV. 819 (1995).

15. John R. Maley, *1994 Federal Civil Practice and Procedure Update for Seventh Circuit Practitioners: A Year of Adjustment*, 28 IND. L. REV. 891 (1995).

16. Charles M. Kidd et al., *Survey of 1994 Developments in the Law of Professional Responsibility*, 28 IND. L. REV. 1013 (1994).

questions they might plan to litigate in cases to come. When the legal director of the Indiana Civil Liberties Union, for example, spends hours thinking and writing about recent developments in state constitutional law,[17] he undoubtedly acquires a clearer sense of what arguments might be viable or which cases may ripen in the future. Just as *Brown v. Board of Education*[18] did not "just happen" but was carefully planned, important litigation is frequently the product of study and organization. I believe that both the authors contributing to this issue of the law review and their readers will be better litigators, better *law-creators*, by virtue of their own engagement in this endeavor.

IV. The Survey Issue and Indiana

A third and sustaining feature of this edition of the *Indiana Law Review* is that it focuses on a real place, our state, where the fates of individuals and institutions rise and fall. Inasmuch as so many American law schools want to be "national" schools doing "national" things, the survey issue finds itself in a category shunned by a good many other journals. I say it is a great category to occupy.

Ah, yes, it is all part and parcel of the great "national school/state school" debate, the "scholastic school/training school" business. Someday when I have nothing better to do I will manage to sort it all out in my own mind and put it down on paper.

In the meantime, there is one thing I know for sure. Indiana is growing again; more people move to this state every year than move out.[19] Indiana is also a place where more and more lawyers want to practice. At last summer's admission ceremony for new lawyers, I was surprised at the number who crossed in front of the bench to announce they were from someplace other than Indiana. The number of people asking to come here to practice on the basis of other state licenses continues to grow; petitions for such admission have doubled since 1990.[20] The clerk's office of our court tells me that there are now 17,182 total lawyers with Indiana licenses, of whom 13,477 hold active licenses.

These lawyers are here doing remarkable things in Indiana, like reforming the representation of indigent defendants in capital cases, as detailed by one of its chief architects, the dean of this law school.[21] Capital litigation reform is a

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17. Richard A. Waples, *Recent Developments Under the Indiana Constitution*, 28 IND. L. REV. 1067 (1995).

18. 348 U.S. 886 (1954).

19. Susan Brudvig, *Indiana Continues to Grow*, IND. BUS. REV., Mar. 1, 1996, at 6.

20. The Board of Law Examiners tells me that 28 people sought admission on foreign license in 1990. Last year 53 applied. This year the number of applicants will apparently be something like 70 or 80. Although the gross numbers are relatively small (less than ten percent of attorneys licensed here each year), the trend is significant because the attorneys doing this are experienced practitioners who are either moving to Indiana or growing their practice here.

21. Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 IND. L. REV. 495 (1996).

development of national import, recognized by the *New York Times*,[22] the American Bar Association,[23] and the Conference of Chief Justices.

Sometimes the idea of being "national" means being relevant to everybody in general and nobody in particular. Great law, however, is best when it is actually applied. Likewise, great national places are local places where great things happen.

The annual survey issue of this law review helps make all of us—lawyers and judges—better practitioners. We believe that improving the rule of law is vital to making this place of nearly six million people safer, more decent, and more prosperous.

CONCLUSION

In short, the editors of the *Indiana Law Review* do the right thing by dedicating a substantial amount of their energy each year to this project. We are all in their debt. You will find beneath this cover some of the very best thinking and writing about what good Indiana practitioners have done to advance the law in the year just past. If you spend the time, you will also gain some insight into what may be about to happen in the year to come and what you can do to affect it. It is all time well spent. Long live the Annual Survey!

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22. Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995, at F22.

23. For example, within the ABA there exist multiple groups working to improve representation in capital cases. Among these are the ABA Post Conviction Death Penalty Representation Project and the Death Penalty Committee or the ABA Section of Individual Rights and Responsibilities. *See, e.g.*, Jim T. Priest, *Pro Bono Aid Needed Now More Than Ever*, A.B.A. J., June 1996, at 66; Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?*, HUM. RTS., Spring 1995, at 10.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 1995*

Kevin W. Betz**
Andrew T. Deibert***

In 1995, the Indiana Supreme Court displayed a high degree of overall consensus and worked through a substantial increase in petitions to transfer. These are the highlights from this fifth annual examination of the supreme court's docket, dispositions and voting. The high degree of consensus may be due to new members of the court. The increase in petitions may also be due to new members, creating an eagerness among members of the bar to take new and more arguments to the court. There is also greater awareness of the court's interest and ability to accept civil matters. In 1994, 659 petitions to transfer where filed with the court, while in 1995 the overall number of petitions to transfer jumped by 134 to 793. The increase was primarily in the area of civil petitions to transfer which climbed from 324 in 1994 to 415 in 1995, a 30% increase.[1]

The supreme court's increased consensus in 1995 was evidenced by a dramatic decrease in split opinions and dissents. The court in 1995 had the highest level of unanimity in the five-year period of this study and split opinions decreased by 50% from any of the previous four years of this study. From 1991 to 1994, the court issued as many as 26 opinions with a vote of 3-2 but no fewer than 24. In 1995, the court issued only 12 such opinions. The number of dissents dropped to a five-year low of 51 with only 19 dissents in civil cases. This is in contrast to 1994 when individual members voted to dissent 83 times with 40 of those in civil cases. In 1993, members dissented 94 times with 49 being in civil

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*. The Tables presented in this Article are patterned after the annual statistics of the United States Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term,* 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review.*

We thank Krieg DeVault Alexander & Capehart for its gracious willingness to devote the time, energy, and resources of its law firm to allow such a project as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard; but, of course, any errors or omissions belong to his former law clerk. We also thank WESTLAW® for its kind willingness to allow us free access to its computer resources and assistance in preparing these Tables.

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1. INDIANA SUPREME COURT ANNUAL REPORT (1995).

cases. These are similar to the numbers for 1992 and 1991. Even though the court issued its lowest number of authored opinions in 1995, it still had the lowest percentage of dissents in the five years of this study. The decrease in dissents can be largely, although not solely, attributed to the retirement in 1994 of Justice Richard M. Givan. The decline in dissents is likely to continue with the retirement in 1996 of Justice Roger O. DeBruler. These justices were the leading dissenters during the past five years on the court.

There are many factors underlying the substantial increase in petitions to transfer. It is likely that members of the bar have become fully aware of the supreme court's renewed interest and ability to accept a variety of civil issues.[2] Another factor is the increased unpredictability of the court due to the addition of two new members over the past two years, and a third being added in 1996.

The court also adopted new rules in 1995 and 1996 that streamline the filing of a petition to transfer. The length of a petition is now limited to five pages or no more than 1,400 words[3] and the length of briefs in support of such petitions are limited to fifteen pages or no more than 4,200 words.[4] In addition, in 1996, the court will make public its decision to grant transfer immediately upon making the decision instead of waiting until the full opinion is issued. As a matter of internal policy, the court's votes on granting petitions will not be public, but the votes denying a petition will now be made public.

The following is a description of the highlights from each Table.

Table A. The Supreme Court issued 126 opinions in 1995 that were authored by an individual justice and also issued 42 Per Curiam opinions. Seventy-five of those opinions analyzed criminal cases and 52 analyzed civil matters while 41 of the 42 Per Curiam opinions decided judicial or attorney discipline cases. Justice Sullivan authored the most opinions at 41, with 18 criminal cases and 23 civil matters. Chief Justice Shepard was next with 32 majority opinions, 20 being criminal cases and 12 civil matters.

The retirement of Justice Givan, who was a prolific author of criminal opinions, did not cause a drastic overall decline in the number of criminal opinions. But several justices' individual dockets, such as Justices Shepard's and Dickson's, decreased from 1994 to 1995 in the number of civil opinions and increased in the number of criminal opinions.

Lastly, although there was an overall decline in the number of dissents from previous years, Justice DeBruler was the leader in 1995 with 19 and Justice Sullivan was next with 16.

Table B-1. For civil cases, Justices Shepard and Selby were the most aligned justices at 91.3%. Justices Dickson and DeBruler were the least aligned in civil cases at 78.8%. Chief Justice Shepard was the most aligned overall with his

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2. *See* Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One,* 63 IND. L.J. 669 (1988); Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade,* 24 IND. L. REV. 499 (1991).

3. *See* IND. R. APP. P. 11(B) (1996).

4. *See* IND. R. APP. P. 11(B)(6) (1996).

fellow justices in civil cases.

Table B-2. For criminal cases, Justices Shepard and Selby were again the most aligned at 95.9%. And, again Justices DeBruler and Dickson were the least aligned at 74.6%. Justice Selby was the most aligned overall with her fellow justices in civil cases.

Table B-3. For all cases, Justices Shepard and Selby were the most aligned at 94.1% and Justices Dickson and DeBruler were the least aligned at 76.3%. Justices Shepard and Selby were tied at being the most aligned overall with their colleagues at an 88% average.

Table C. In the five-year period of this study, 1995 was the year in which the court had the highest degree of unanimity. Seventy percent of its opinions were unanimous or unanimous with concurrence and only 30% of its opinions were issued with a dissent.

Table D. As stated earlier, the court in 1995 had its fewest number of 3-2 opinions at 12. Justice Selby, serving in her first year, and Justice Dickson were in the majority in 10 of those opinions, more than any of their fellow justices. The longest serving member, Justice DeBruler, was in the three-justice majority the least number of times at 3. The three-justice majority that collaborated the most, in 5 of the 12 split opinions, was Justices Shepard, Dickson and Selby.

Table E. In 1995, 58% of the cases that came to the court were reversed and 42% were affirmed. Sixty-nine percent of the civil petitions to transfer that were granted resulted in a reversal.

Table F. As for selected subject areas, the court dropped to only 3 opinions dealing with the Indiana Constitution. In the four previous years the court had dealt with the Indiana Constitution in no fewer than 7 cases and in as many as 11 opinions. The court disposed of its usual number of attorney and/or judicial discipline cases at 61, but there was an increase in tax cases to 7 and a decrease in death penalty cases to 3.

TABLE A
OPINIONS[a]

	OPINIONS OF COURT[b]			CONCURRENCES[c]			DISSENTS[d]		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	20	12	32	3	1	4	2	2	4
DeBruler, J.	11	5	16	5	3	8	12	7	19
Dickson, J.	16	8	24	2	2	4	6	5	11
Sullivan, J.[e]	18	23	41	3	1	4	11	5	16
Selby, J.[e]	9	4	13	2	2	4	1	0	1
Per Curiam	1	41	42						
Total	75	93	168	15	9	24	32	19	51

[a] These are opinions and votes on opinions by each justice and in per curiam in the 1995 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. *See* Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts,* 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *Id.* at 210.

[b] Plurality opinions that announce the judgment of the court are counted as opinions of the court. This is only a counting of full opinions written by each justice. It includes opinions on civil, criminal, and original actions and disciplinary matters. It does not include rehearing opinions nor 18 orders handed down on disciplinary matters. The Court handed down 59 orders or opinions on attorney disciplinary matters and 2 opinions or orders on judicial disciplinary matters. Of these 61 orders or opinions, 41 were handed down as per curiam opinions and the others were signed by individual justices. Also, the following 6 miscellaneous cases are not included in this chart—Spencer v. State, 653 N.E.2d 476 (Ind. 1995); Bivins v. State, 650 N.E.2d 684 (Ind. 1995); Cotton v. State, 658 N.E.2d 898; and Howard Publications, Inc. v. Lake Michigan Charters, Ltd., 658 N.E.2d 582 (Ind. 1995) which were votes on petitions to transfer and petitions for rehearing; nor *In re* Clerk's Proposal Regarding Contracting Out Microfilming Operations, 650 N.E.2d 680 (Ind. 1995) and *In re* Management of Indiana Supreme Court Disciplinary Comm'n Fund, 650 N.E.2d 679 (Ind. 1995), which were votes on administrative matters.

[c] This category includes both written concurrences and votes to concur in result only.

[d] This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

[e] Justice Sullivan did not participate in two opinions—Indiana Dep't of State Revenue v. Fort Wayne Nat'l Corp. , 649 N.E.2d 109 (Ind. 1995) and Savage v. State, 655 N.E.2d 1223 (Ind. 1995). Justice Selby did not participate in 16 opinions in 1995—Bowman v. Kitchel, 644 N.E.2d 878 (Ind. 1995); Harrison v. State, 644 N.E.2d 1243 (Ind. 1995); Frankenmuth Mut. Ins. Co. v. Williams, 645 N.E.2d 605 (Ind. 1995); Mullins v. State, 646 N.E.2d 40 (Ind. 1995); *In re* Cushing, 646 N.E.2d 662 (Ind. 1995); *In re* Brown, 646 N.E.2d 664 (Ind. 1995); *In re* Anonymous, 646 N.E.2d 666 (Ind. 1995); *In re* Peoples, 646 N.E.2d 669 (Ind. 1995); *In re* Shumate, 647 N.E.2d 321 (Ind. 1995); *In re* Smith, 648 N.E.2d 651 (Ind. 1995); Mayhue v. Sparkman, 653 N.E.2d 1384 (Ind. 1995); *In re* Kern, 655 N.E.2d 339 (Ind. 1995); RJR Nabisco Holdings Corp. v. Dunn, 657 N.E.2d 1220 (Ind. 1995); Howard Publications, Inc. v. Lake Michigan Charters, Ltd., 658 N.E.2d 582 (Ind. 1995); Shewmaker v. Etter, 659 N.E.2d 1021 (Ind. 1995); Stiller v. Leatherman, 659 N.E.2d 1021 (Ind. 1995). The first four of the cases listed for Justice Selby are cases that were handed down when Justice Givan was still a member of the court.

TABLE B-1

VOTING ALIGNMENTS FOR CIVIL CASES NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[f]

		Shepard, C.J.	DeBruler, J.	Dickson, J.	Sullivan, J.	Selby, J.
Shepard, C.J.	O		45	46	44	42
	S		1	0	0	0
	D	---	46	46	44	42
	N		52	52	51	46
	P		88.4%	88.4%	86.2%	91.3%
DeBruler, J.	O	45		41	41	38
	S	1		0	2	1
	D	46	---	41	43	39
	N	52		52	51	46
	P	88.4%		78.8%	84.3%	84.7%
Dickson, J.	O	46	41		42	40
	S	0	0		0	0
	D	46	41	---	42	40
	N	52	52		51	46
	P	88.4%	78.8%		82.3%	86.9%
Sullivan, J.	O	44	41	42		38
	S	0	2	0		0
	D	44	43	42	---	38
	N	51	51	51		45
	P	86.2%	84.3%	82.3%		84.4%
Selby, J.	O	42	38	40	38	
	S	0	1	0	0	
	D	42	39	40	38	---
	N	46	46	46	45	
	P	91.3%	84.7%	86.9%	84.4%	

[f] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases not including disciplinary cases. For example, in the top set of numbers for Chief Justice Shepard, 45 is the number of times Chief Justice Shepard and Justice DeBruler agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-2

VOTING ALIGNMENTS FOR CRIMINAL CASES NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[g]

		Shepard, C.J.	DeBruler, J.	Dickson, J.	Sullivan, J.	Selby, J.
Shepard, C.J.	O		60	66	63	70
	S		0	1	1	0
	D	---	60	67	64	70
	N		75	75	74	73
	P		80.0%	89.3%	86.4%	95.9%
DeBruler, J.	O	60		56	54	61
	S	0		0	3	1
	D	60	---	56	57	62
	N	75		75	74	73
	P	80.0%		74.6%	77.0%	84.9%
Dickson, J.	O	66	56		58	66
	S	1	0		0	0
	D	67	56	---	58	66
	N	75	75		74	73
	P	89.3%	74.6%		78.3%	90.4%
Sullivan, J.	O	63	54	58		62
	S	1	3	0		1
	D	64	57	58	---	63
	N	74	74	74		72
	P	86.4%	77.0%	78.3%		87.5%
Selby, J.	O	70	61	66	62	
	S	0	1	0	1	
	D	70	62	66	63	---
	N	73	73	73	72	
	P	95.9%	84.9%	90.4%	87.5%	

[g] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases not including disciplinary cases. For example, in the top set of numbers for Chief Justice Shepard, 60 is the number of times Chief Justice Shepard and Justice DeBruler agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-3

VOTING ALIGNMENTS FOR ALL CASES NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[h]

		Shepard, C.J.	DeBruler, J.	Dickson, J.	Sullivan, J.	Selby, J.
	O		105	112	107	112
	S		1	1	1	0
Shepard, C.J.	D	---	106	113	108	112
	N		127	127	125	119
	P		83.5%	88.9%	86.4%	94.1%
	O	105		97	95	99
	S	1		0	5	2
DeBruler, J.	D	106	---	97	100	101
	N	127		127	125	119
	P	83.5%		76.3%	80.0%	84.8%
	O	112	97		100	106
	S	1	0		0	0
Dickson, J.	D	113	97	---	100	106
	N	127	127		125	119
	P	88.9%	76.3%		80.0%	89.0%
	O	107	95	100		100
	S	1	5	0		1
Sullivan, J.	D	108	100	100	---	101
	N	125	125	125		117
	P	86.4%	80.0%	80.0%		86.3%
	O	112	99	106	100	
	S	0	2	0	1	
Selby, J.	D	112	101	106	101	---
	N	119	119	119	117	
	P	94.1%	84.8%	89.0%	86.3%	

[h] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases except disciplinary cases. For example, in the top set of numbers for Chief Justice Shepard, 105 is the total number of times Chief Justice Shepard and Justice DeBruler agreed in all full majority opinions written by the court in 1995. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE C

UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[i]

Unanimous[j]			Unanimous With Concurrence[k]			Opinions With Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
37	36	73(58.4%)	10	4	14(11.2%)	27	11	38(30.4%)	125

[i] This Table tracks the number and percent of unanimous opinions among all opinions written except disciplinary opinions. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

[j] A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

[k] A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D

3-2 DECISIONS[l]

Justices Constituting the Majority	Number of Opinions[m]
1. Shepard, C.J., Dickson, J., Selby, J.	5
2. Shepard, C.J., Sullivan, J., Selby, J.	1
3. Shepard, C.J., Dickson, J., Sullivan, J.	2
4. DeBruler, J., Dickson, J., Selby, J.	2
5. DeBruler, J., Sullivan, J., Selby, J.	1
6. Dickson, J., Sullivan, J., Selby, J.	1
Total[n]	12

[l] This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

[m] This column lists the number of times each 3-justice group constituted the majority in a 3-2 decision.

[n] The 1995 term's 3-2 decisions were:

1. Shepard, C.J., Dickson, J., Selby, J.: Miller v. Walker, 655 N.E.2d 47 (Ind. 1995) (Shepard); State *ex rel.* Woodford v. Marion Superior Court, 655 N.E.2d 63 (Ind. 1995) (Shepard); Hall v. Indiana Dep't of State Revenue, 660 N.E.2d 319 (Ind. 1995) (Shepard); Bryant v. State, 660 N.E.2d 290 (Ind. 1995) (Shepard); Clifft v. Indiana Dep't of State Revenue, 660 N.E.2d 310 (Ind. 1995) (Shepard).

2. Shepard, C.J., Sullivan, J., Selby, J.: *In re* Curtis, 656 N.E.2d 258 (Ind. 1995) (per curiam).

3. Shepard, C.J., Dickson, J., Sullivan, J.: Coleman v. State, 653 N.E.2d 481 (Ind. 1995) (Shepard); Fresh Cut, Inc. v. Fazli, 650 N.E.2d 1126 (Ind. 1995) (Sullivan).

4. DeBruler, J., Dickson, J., Selby, J.: *In re* Goldstein, 654 N.E.2d 746 (Ind. 1995) (per curiam); Johnson v. State, 659 N.E.2d 116 (Ind. 1995) (DeBruler).

5. DeBruler, J., Sullivan, J., Selby, J.: Lay v. State, 659 N.E.2d 1005 (Ind. 1995) (Sullivan).

6. Dickson, J., Sullivan, J., Selby, J.: Parke State Bank v. Akers, 659 N.E.2d 1031 (Ind. 1995) (Selby).

TABLE E

DISPOSITION OF CASES REVIEWED BY TRANSFER AND DIRECT APPEALS[o]

	Reversed or Vacated[p]	Affirmed	Total
Civil Appeals Accepted for Transfer	29 (69%)	13 (31%)	42
Civil Direct Appeals	3 (60%)	2 (40%)	5
Criminal Appeals Accepted for Transfer	25 (74%)	9 (26%)	34
Criminal Direct Appeals	14 (34%)	27 (66%)	41
Total	71 (58%)	51 (42%)	122[q]

[o] Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. *See* IND. CONST. art. VII, § 4. Direct criminal appeals reach the supreme court directly from the trial court. A civil appeal may also come directly from the trial court. *See* IND. R. APP. P. 4(A) (entitled Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. R. APP. P. 11(B). The court's transfer docket, especially civil cases, has substantially increased. *See* Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

[p] This column reflects actions by the supreme court that reach a different result with respect to appeals accepted for transfer from the court of appeals or with respect to direct appeals from a trial court. Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, while the term "reverse" is used when the court overrules a trial court decision. In reviewing this Table, it should be noted that the court may "vacate" the court of appeals opinion that it accepts for transfer, but may only disagree with a small portion of the reasoning while agreeing with the result. *See* IND. R. APP. P. 11(B)(3).

[q] This does not include 61 attorney discipline opinions, four writs of mandamus or prohibition, and six miscellaneous cases. These opinions did not reverse, vacate or affirm any other court's decision.

TABLE F

SUBJECT AREAS OF SELECTED DISPOSITIONS WITH FULL OPINIONS[r]

Original Actions	Number
• Certified Questions	0
• Writs of Mandamus or Prohibition	3[s]
• Attorney and Judicial Discipline	61[t]
Criminal	
• Death Penalty	3[u]
• Fourth Amendment or Search and Seizure	3[v]
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	1[w]
Trusts, Estates or Probate	0
Real Estate or Real Property	3[x]
Landlord-Tenant	2[y]
Divorce or Child Support	4[z]
Children in Need of Services (CHINS)	0
Paternity	0
Product Liability or Strict Liability	1[aa]
Negligence or Personal Injury	7[bb]
Indiana Tort Claims Act	0
Statute of Limitations or Statute of Repose	0
Tax, Department of State Revenue, or State Board of Tax Commissioners	7[cc]
Contracts	1[dd]
Corporate Law or the Indiana Business Corporation Law	3[ee]
Uniform Commercial Code	0
Banking Law	2[ff]
Employment Law	5[gg]
Environmental Law	0
First Amendment, Open Door Law, or Public Records Law	1[hh]
Indiana Constitution	3[ii]

[r] This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 1995. It also provides a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. A citation list is provided in a footnote for each area.

[s] State *ex rel.* Crawford v. Delaware Circuit Court, 655 N.E.2d 499 (Ind. 1995); State *ex rel.* Woodford v. Marion Superior Court, 655 N.E.2d 63 (Ind. 1995); State *ex rel.* Griffin v. Lawler, 659 N.E.2d 514 (Ind. 1995).

[t] *In re* Sheaffer, 655 N.E.2d 1214 (Ind. 1995); *In re* Antcliff, 645 N.E.2d 608 (Ind. 1995); *In re* Cushing, 646 N.E.2d 662 (Ind. 1995); *In re* Brown, 646 N.E.2d 664 (Ind. 1995); *In re* Anonymous, 646 N.E.2d

666 (Ind. 1995); *In re* Dils, 646 N.E.2d 667 (Ind. 1995); *In re* Peoples, 646 N.E.2d 669 (Ind. 1995); *In re* Dunnuck, 647 N.E.2d 631 (Ind. 1995); *In re* Lustina, 647 N.E.2d 317 (Ind. 1995); *In re* Ragland, 647 N.E.2d 319 (Ind. 1995); *In re* Shumate, 647 N.E.2d 321 (Ind. 1995); *In re* Comer, 648 N.E.2d 358 (Ind. 1995); *In re* Smith, 648 N.E.2d 651 (Ind. 1995); *In re* Brubaker, 648 N.E.2d 651 (Ind. 1995); *In re* Woolbert, 648 N.E.2d 1152 (Ind. 1995); *In re* Wright, 648 N.E.2d 1148 (Ind. 1995); *In re* Stivers, 648 N.E.2d 1147 (Ind. 1995); *In re* Mullins, 649 N.E.2d 1024 (Ind. 1995); *In re* Warter, 650 N.E.2d 303 (Ind. 1995); *In re* Levin, 650 N.E.2d 303 (Ind. 1995); *In re* Bloom, 649 N.E.2d 1031 (Ind. 1995); *In re* Tuel, 650 N.E.2d 1139 (Ind. 1995); *In re* Strutz, 652 N.E.2d 41 (Ind. 1995); *In re* Drozda, 653 N.E.2d 991 (Ind. 1995); *In re* Withers, 652 N.E.2d 502 (Ind. 1995); *In re* McLure, 652 N.E.2d 863 (Ind. 1995); *In re* Reynolds, 652 N.E.2d 68 (Ind. 1995); *In re* Powell, 652 N.E.2d 68 (Ind. 1995); *In re* Coleman, 653 N.E.2d 476 (Ind. 1995); *In re* Robak, 654 N.E.2d 731 (Ind. 1995); *In re* Zoccola, 654 N.E.2d 743 (Ind. 1995); *In re* Fletcher, 655 N.E.2d 58 (Ind. 1995); *In re* Anonymous, 654 N.E.2d 1128 (Ind. 1995); *In re* Anonymous, 655 N.E.2d 67 (Ind. 1995) (Note: This case is a consolidation of two actions.); *In re* Okumu, 654 N.E.2d 1130 (Ind. 1995); *In re* Goldstein, 654 N.E.2d 746 (Ind. 1995); *In re* Kern, 655 N.E.2d 339 (Ind. 1995); *In re* Kelly, 655 N.E.2d 1220 (Ind. 1995); *In re* Hill, 655 N.E.2d 343 (Ind. 1995); *In re* Headlee, 655 N.E.2d 506 (Ind. 1995); *In re* Morris, 656 N.E.2d 257 (Ind. 1995); *In re* Curtis, 656 N.E.2d 258 (Ind. 1995); *In re* Schreiber, 656 N.E.2d 480 (Ind. 1995); *In re* Reed, 657 N.E.2d 103 (Ind. 1995); *In re* Weybright, 656 N.E.2d 1142 (Ind. 1995); *In re* Jarrett, 657 N.E.2d 106 (Ind. 1995); *In re* Anonymous, 657 N.E.2d 394 (Ind. 1995); *In re* Okumu, 657 N.E.2d 117 (Ind. 1995); *In re* Burns, 657 N.E.2d 738 (Ind. 1995); *In re* Powell, 658 N.E.2d 572 (Ind. 1995); *In re* Brown, 659 N.E.2d 112 (Ind. 1995); *In re* Turner, 658 N.E.2d 901 (Ind. 1995); *In re* Lively, 658 N.E.2d 903 (Ind. 1995); *In re* Beardsley, 658 N.E.2d 591 (Ind. 1995); *In re* Conway, 658 N.E.2d 592 (Ind. 1995); *In re* Gonzales, 659 N.E.2d 479 (Ind. 1995); *In re* Cherry, 658 N.E.2d 596 (Ind. 1995); *In re* Skinner, 648 N.E.2d 650 (Ind. 1995); *In re* Goodman, 649 N.E.2d 115 (Ind. 1995); *In re* Johnson, 658 N.E.2d 589 (Ind. 1995).

[u] Harrison v. State, 644 N.E.2d 1243 (Ind. 1995), *aff'g and remanding* (direct appeal); Spranger v. State, 650 N.E.2d 1117 (Ind. 1995), *aff'g and remanding for resentencing* (post conviction relief); Harrison v. State, 659 N.E.2d 480 (Ind. 1995), *aff'g* (direct appeal).

[v] Brown v. State, 653 N.E.2d 77 (Ind. 1995); Jones v. State, 655 N.E.2d 49 (Ind. 1995); Taylor v. State, 659 N.E.2d 535 (Ind. 1995).

[w] Pence v. State, 652 N.E.2d 486 (Ind. 1995).

[x] Fresh Cut, Inc. v. Fazli, 650 N.E.2d 1126 (Ind. 1995); Shipshewana Convenience Corp. v. Board of Zoning Appeals of LaGrange County, 656 N.E.2d 812 (Ind. 1995); Chandler v. Board of Zoning Appeals of Evansville & Vanderburgh County, 658 N.E.2d 80 (Ind. 1995).

[y] Fresh Cut, Inc. v. Fazli, 650 N.E.2d 1126 (Ind. 1995); Matusky v. Sheffield Square Apartments, 654 N.E.2d 740 (Ind. 1995).

[z] Daugherty v. Ritter, 652 N.E.2d 502 (Ind. 1995); Leiter v. Scott, 654 N.E.2d 742 (Ind. 1995); Stultz v. Stultz, 659 N.E.2d 125 (Ind. 1995); Garrod v. Garrod, 655 N.E.2d 336 (Ind. 1995).

[aa] Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995).

[bb] Drake v. Mitchell Community Sch., 649 N.E.2d 1027 (Ind. 1995); Mayhue v. Sparkman, 653 N.E.2d 1384 (Ind. 1995); Ward v. St. Mary Medical Ctr. of Gary, 658 N.E.2d 893 (Ind. 1995); Heck v. Robey, 659 N.E.2d 498 (Ind. 1995); Kennedy v. Murphy, 659 N.E.2d 506 (Ind. 1995); Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995); Hughes v. Glaese, 659 N.E.2d 516 (Ind. 1995).

[cc] Indiana Dep't of State Revenue v. Fort Wayne Nat'l Corp., 649 N.E.2d 109 (Ind. 1995), *vacating*; Indiana Dep't of State Revenue v. Bulkmatic Transport Co., 648 N.E.2d 1156 (Ind. 1995), *rev'g*; Indiana Dep't of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995), *rev'g*; Hall v. Indiana Dep't of State Revenue, 660 N.E.2d 319 (Ind. 1995), *aff'g in part and rev'g in part*; Hayse v. Indiana Dep't of State Revenue, 660 N.E.2d 325 (Ind. 1995), *rev'g*; Bailey v. Indiana Dep't of State Revenue, 660 N.E.2d 322 (Ind. 1995), *rev'g*; Clifft v.

Indiana Dep't of State Revenue, 660 N.E.2d 310 (Ind. 1995), *aff'g in part and rev'g in part.*

[dd] Blackburn v. Sweeney, 659 N.E.2d 131 (Ind. 1995).

[ee] Farmers Loan & Trust Co. v. Letsinger, 652 N.E.2d 63 (Ind. 1995); Blackburn v. Sweeney, 659 N.E.2d 131 (Ind. 1995); Barth v. Barth, 659 N.E.2d 559 (Ind. 1995).

[ff] Carpenter v. Farm Credit Serv. of Mid-America, ACA, 654 N.E.2d 1125 (Ind. 1995); Parke State Bank v. Akers, 659 N.E.2d 1031 (Ind. 1995).

[gg] Hill v. Worldmark Corp./Mid America Extrusions Corp., 651 N.E.2d 785 (Ind. 1995); Ackerman v. Kimball Int'l, Inc., 652 N.E.2d 507 (Ind. 1995); McQuade v. Draw Tite, Inc., 659 N.E.2d 1016 (Ind. 1995); Bagley v. Insight Communications Co., 658 N.E.2d 584 (Ind. 1995); Benante v. United Pacific Life Ins. Co., 659 N.E.2d 545 (Ind. 1995).

[hh] Town of Merrillville v. Peters, 655 N.E.2d 341 (Ind. 1995).

[ii] Brown v. State, 653 N.E.2d 77 (Ind. 1995); Pence v. State, 652 N.E.2d 486 (Ind. 1995); Clark v. State, 659 N.E.2d 548 (Ind. 1995).

BANKRUPTCY IN THE SEVENTH CIRCUIT: 1995

DOUGLASS G. BOSHKOFF*

INTRODUCTION

This Article discusses some bankruptcy and bankruptcy-related cases decided by the Seventh Circuit during the year ending October 31, 1995. As in past years, it reviews only opinions of more than routine interest.

I. POWERS OF AVOIDANCE

There were three very interesting avoiding-power decisions during the period of time covered by this Article.

Freedom Group, Inc. v. Lapham-Hickey Steel Corp. (In re Freedom Group, Inc.)[1] involved a challenge to the creditor's prebankruptcy garnishment of funds in the debtor's bank account. The creditor in this case obtained a judgment against the debtor in an Indiana state court. Shortly thereafter, the court issued a "notice of garnishment." The creditor served this "notice of garnishment" on the debtor's bank ninety-one days before the debtor filed for bankruptcy protection. At that time, the debtor's account contained $108.25. The next day, i.e., the ninetieth day before bankruptcy, the debtor deposited $18,000 in the account. On the following day, the state court entered a final order directing the bank to pay the creditor in accordance with its order, and the bank complied.

After receiving bankruptcy protection, the bankruptcy estate sought to avoid the garnishment under 11 U.S.C. § 547, arguing that the garnishment was a preferential transfer because the actual transfer of the funds occurred within ninety days of the debtor's filing for bankruptcy protection.[2] The creditor claimed that the transfer occurred when it served the notice of garnishment because, in its view, it had acquired a property interest at that time. According to the creditor, this constituted a transfer that occurred "before the ninety-day portcullis descended."[3] This argument was not well received: "It is a nice, tidy, 'logical' argument but so manifestly contrary to the purpose of the statute as to incite grave doubts, at least in judges who are not in thrall to the syllogistic style of legal reasoning."[4]

The court's opinion did not explore whether the result in *In re Freedom Group, Inc.* can be reconciled with another Seventh Circuit decision, *In re Coppie*,[5] which held that wages earned within ninety days of bankruptcy cannot be recovered by the trustee when they are paid to a creditor pursuant to a

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1. 50 F.3d 408 (7th Cir. 1995).
2. 11 U.S.C. § 547(b)(4)(A) (1994).
3. *In re Freedom Group, Inc.*, 50 F.3d at 410.
4. *Id.*
5. 728 F.2d 951 (7th Cir. 1984), *cert. denied sub nom.* Gouveia v. Hammond Clinic, 469 U.S. 1105 (1985).

garnishment obtained outside the ninety-day period.[6] Both *In re Freedom Group, Inc.* and *In re Coppie* involve voluntary debtor activity, earning wages or making bank deposits, resulting in a transfer of value to a creditor pursuant to a judicial writ within ninety days of bankruptcy. Only *In re Freedom Group, Inc.* adopts the better[7] view that the value transferred in that ninety day period can be recovered for the bankruptcy estate, notwithstanding the age of the writ. As Judge Posner observed,

> Freedom Group did not have to deposit $18,000—or 1¢—in its bank account after the notice of garnishment was issued. That was a decision made (or effectuated) by Freedom Group within ninety days of declaring bankruptcy, and thus during the period of avoidable preferences. The effect was to put one of its creditors, the one that had succeeded in garnishing its bank account, ahead of the others—and that is just the sort of thing that the preferential-transfer statute is intended to prevent.[8]

This reasoning is very persuasive.[9] It suggests that *In re Coppie* was incorrectly decided.

The court in *In re Freedom Group, Inc.* also held that the debtor could recover the $108.25 that had been in the account even though it had been deposited before the ninetieth day prior to the filing. The court reasoned that the creditor's right to the funds was not fully established until the final order in the garnishment was entered:

> There might be another creditor ahead of it; there might be some serious defect in the judgment; the judgment might not be against this debtor; the garnishee might not be holding funds owed to the debtor; and so forth. Suppose the debtor wanted this creditor to get his money. The debtor might decide not to interpose valid defenses to the garnishment. This decision might come, or take effect, well into the preference period. The effect would be, within that period, to favor one creditor over another.[10]

This reasoning, which focuses on uncertainty of collection, if carried to its logical conclusion, casts doubt on the validity of all security interests in

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6. *In re Coppie* ignores 11 U.S.C. § 547(e)(3) which states: "For purposes of [§ 547], a transfer is not made until the debtor has acquired rights in the property transferred." Thus, the age of the writ is irrelevant. Any rule of state law purporting to transfer unearned wages to a creditor at an earlier date is invalidated by the quoted language.

7. 1 DAVID EPSTEIN, ET AL., BANKRUPTCY § 6-15, at 553-57 (1992).

8. *In re Freedom Group, Inc.*, 50 F.3d at 411.

9. The operation of an after-acquired property clause can similarly improve the position of a secured creditor on the eve of bankruptcy. However, the Bankruptcy Code protects the subsequently acquired security interest in certain circumstances. *See* 11 U.S.C. § 547(c)(5) (1994). No similar protection is available for after-acquired property interests attributable to the operation of judicial liens.

10. *In re Freedom Group, Inc.*, 50 F.3d at 412.

bankruptcy.[11] The secured creditor is completely sure of payment only when payment actually occurs. Until then, there is the possibility that the collateral may be lost, destroyed or misappropriated by the debtor. These possibilities make collection uncertain in that the creditor may not be paid. One can assume that the court in *In re Freedom Group, Inc.* did not intend to restructure so radically the debtor-creditor relationship. A less expansive, more sensible interpretation of this part of the opinion is possible: The uncertainty of recovery should include only the legal uncertainty of non-final court orders, not the general uncertainty regarding collection that any secured creditor experiences until the secured obligation is satisfied.

Scholes v. Lehmann,[12] while not arising in a bankruptcy proceeding, contains a discussion of fraudulent conveyance law that should be of interest to bankruptcy practitioners. Scholes sued various defendants in his capacity as receiver of an insolvent corporation. Some of the defendants were charitable religious organizations that had received gifts of corporate assets.[13] They argued unsuccessfully that the state fraudulent conveyance statute[14] should be interpreted to exclude charitable contributions. The same result should obtain if a bankruptcy trustee seeks to avoid a debtor's charitable contributions under § 548.[15]

Scholes did not consider whether these donative transactions were protected by the First Amendment because this issue was not properly raised in the trial court.[16] There is also the possibility that avoidance may conflict with the Religious Freedom Restoration Act of 1993.[17] Until these issues are resolved, the ability of a trustee to avoid transfers by a Chapter 7 debtor to a religious charitable entity remains unclear. *Scholes* probably does not require any change in the way charitable contributions are handled in Chapter 13 plans,[18] even if such contributions are regarded as fraudulent transfers, because the disposable income test[19] allows a debtor to build a budget containing expenditures that do not benefit its creditors.

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11. It also calls into question the validity of prejudgment seizures pursuant to provisional writs of attachment and garnishment. The ultimate effect of these remedies cannot be determined until a final judgment is rendered.

12. 56 F.3d 750 (7th Cir. 1995), *cert. denied sub nom.* African Enter. Inc. v. Scholes, 116 S. Ct. 673 (1995).

13. The court's treatment of the fraudulent conveyance issue did not make any distinction between direct and indirect transfers to the charities. *Id.* at 762.

14. *Scholes* was decided under Illinois's old Fraudulent Conveyance Statute, ILL. REV. STAT. ch. 59, para. 4 (1987). This statute was replaced when Illinois enacted the Uniform Fraudulent Transfer Act in 1990. 740 I.L.C.S.A. 160/1 to /12 (Smith-Hurd 1993).

15. 11 U.S.C. § 548 (1994).

16. *Scholes*, 56 F.3d at 760.

17. 42 U.S.C. § 2000bb (1994). *See* Christians v. Crystal Evangelical Free Church, 82 F.3d 1407 (8th Cir. 1996) (Avoidance of tithe violates RFRA.).

18. *See* 2 KEITH LUNDIN, CHAPTER 13 BANKRUPTCY § 5.36, at 5-109 to 5-511 (2d ed. 1994).

19. 11 U.S.C. § 1325(b)(1)(B) (1994).

Steinberg v. Buczynski,[20] the third interesting avoiding power decision, reexamines the scope of a trustee's ability to maintain a veil-piercing or alter ego action against the shareholders of the debtor corporation. *Koch Refining v. Farmers Union Central Exchange, Inc.*,[21] had given the trustee wide latitude. *Steinberg* suggests that a retreat from the holding in *Koch* may be underway because it explicitly conditions the trustee's right upon a showing of an injury to a separate identifiable interest of the corporate entity:[22]

> We do not question the right of a trustee in bankruptcy to maintain a "veil piercing" suit on behalf of a bankrupt corporation . . . , but the qualification "on behalf" must be stressed. If the corporation is injured by the shareholders' disregard of corporate formalities, or stated differently but equivalently if a claim against the shareholders arising from their disregard of corporate formalities is the property of the corporation then the trustee can sue; otherwise he cannot.[23]

This language indicates a lack of enthusiasm for *Koch's* approval of alter ego suits by bankruptcy trustees.[24] Although policy arguments support the position adopted in *Koch*,[25] it would be unwise to rely heavily on the continued vitality of this holding until the position of the Seventh Circuit is clarified.[26]

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20. 40 F.3d 890 (7th Cir. 1994).

21. 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988).

22. In *Steinberg*, the court determined that the shareholders of a subchapter S corporation had not harmed the corporation, and, therefore, the corporation had no claim against them. The harm done was to another entity (i.e., a pension fund). It was the fund that could sue the shareholders, not the trustee, because the trustee had no interest in the suit. *Steinberg*, 40 F.3d at 892-93.

23. *Id.* at 892 (citations omitted).

24. The court in *Koch* was satisfied with a vague allegation of injury to the corporation. *Koch*, 831 F.2d at 1349.

25. "Veil-piercing actions are in many respects identical to the avoiding actions that the trustee undoubtedly enjoys under § 544. It is hard to explain why the trustee should be able to avoid transfers of property that the creditors could have avoided, but not bring damage actions." DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 108 (rev. ed. 1993).

26. Some of the uncertainty in this area is due to the court's unwillingness in *Koch* to determine whether 11 U.S.C. § 541 (1994) or 11 U.S.C. § 544(a) (1994) authorizes such an action. *Koch*, 831 F.2d at 1346 n.7. One commentator has referred to *Koch* as "a very hazy opinion." *See* Richard L. Epling, *Trustee's Standing to Sue in Alter Ego or Other Damage Actions*, 6 BANKR. DEV. J. 191, 196 (1989).

Logically, alter ego actions are related to creditor-related avoiding powers under § 544 because the corporation itself has not been harmed by the disregard of corporate form. Reliance on § 544 is problematic in view of Congress' failure to overrule Caplin v. Marine Midland Grace Co., 406 U.S. 416 (1972) (bankruptcy trustee has no standing to sue indenture trustee on behalf of individual bondholders). *See In re* Ozark Restaurant Equip. Co., 816 F.2d 1222 (8th Cir. 1987).

II. EXEMPTIONS

In re Voelker[27] examined the enforceability of a federal tax lien on exempt property during Chapter 13 proceedings. All of the debtor's property was subject to the tax lien imposed by § 6331 of the Internal Revenue Code.[28] Some of his assets, namely, clothing, hand tools, a lawnmower, a weed-eater, a bow and some arrows, were exempt from levy under I.R.C. § 6334. Outside of bankruptcy, the debtor is entitled to retain these assets without paying any of the tax obligation. However, the property remains subject to the lien that must be satisfied if a sale occurs.

When the IRS filed a proof of a secured claim, two issues were before the court. Did the IRS have a secured claim, and, if so, did the debtor need to make payments during the term of the plan because of the lien? The court correctly answered the first question affirmatively. The IRS was the holder of a secured claim—because the property was not exempt, as that term is commonly understood. But then, the court required the debtor to include the allowed amount of the secured claim ($825) in his proposed plan on the assumption that this was required by 1325(a)(5)(B)(ii).[29] The latter conclusion is questionable.

Section 1325(a)(5) of 11 U.S.C. establishes the cost of cramdown.[30] It is not applicable when the debtor does not choose to attempt cramdown.[31] The debtor should have been allowed to retain the semi-exempt assets without paying anything to the IRS and without affecting the tax lien. This is exactly what would have occurred if the debtor had not filed for bankruptcy. No considerations of bankruptcy policy require a different result. As the Supreme Court observed in *Butner v. United States*: "Property interests are created and defined by [nonbankruptcy law—federal and state]. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently because an interested party is involved in a bankruptcy proceeding."[32]

Another interesting decision, *In re Salzer*,[33] examined the effect of a trustee's

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27. 42 F.3d 1050 (7th Cir. 1994).

28. I.R.C. § 6331 (1994).

29. 11 U.S.C. § 1325(a)(5)(B)(ii) (1994). The debtor responded by surrendering these assets to the IRS. *Voelker*, 42 F.3d at 1051.

30. Cramdown is the popular term for confirmation of a plan over the objection of an impaired class of claims.

31. A literal interpretation of § 1325(a)(5) would lead to the conclusion that *Voelker* was correctly decided. The statute appears to offer only three options: surrender, cramdown payments or creditor consent. However, cramdown is never required when the debtor proposes another permissible treatment of a secured claim, most notably when the debtor invokes the remedy of cure authorized by § 1322(a)(5). Because the rights of the IRS are exactly the same before, during, and after the Chapter 13 bankruptcy, and bankruptcy imposes no special burden on the creditor, continuance of the claim's nonbankruptcy status is appropriate under 11 U.S.C. § 1322(a)(10).

32. Butner v. United States, 440 U.S. 48, 55 (1979). On the role of nonbankruptcy law, see generally THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW ch. 2 (1986).

33. 52 F.3d 708 (7th Cir. 1995), *cert. denied sub nom.* Salzer v. Stinson, 116 S. Ct. 1273

failure to object to an exemption claim within the thirty days provided by Bankruptcy Rule 4003(b). Following expiration of the objection deadline, the debtor demanded the exempt assets. When the trustee failed to comply with this request, the debtor sued, alleging a violation of 11 U.S.C. § 362(a)(3). Obviously anxious to protect the trustee from liability, the court rejected the claim on the grounds that the exemption valuation process was not complete. Therefore, the asset remained properly in his control. This reasoning[34] is inconsistent with the holding in *Taylor v. Freeland & Kronz*.[35] It is also at odds with the policy supporting Bankruptcy Rule 4003(b). As Collier observes, "[T]he debtor's valuation of the property for exemption purposes must be accepted once the deadline for exemptions has passed. Otherwise, that deadline would be meaningless."[36]

Hard cases make bad law.[37] There was a much easier path to the same result. The conduct in question did not violate § 362(a)(3). That provision only prohibits conduct that interferes with the title or possession of the bankruptcy estate. If the trustee withholds improperly exempt property from the debtor, the correct way to challenge this action is to request abandonment in accordance with 11 U.S.C. § 554(b).[38]

III. EXECUTORY CONTRACTS

As a result of the efforts of two writers, Jay Westbrook and William Andrews,[39] the approach in this country to executory contract analysis is slowly changing. *In re C&S Grain Co.*[40] shows how painfully slow the process of change

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(1996).

34. "[T]he failure to object to an exemption does not waive any right to contest the validity of the exemption, [however], such a failure does not waive the estate's right to any excess value over the allowed exemption limit." *Id.* at 712 (citations omitted). This reasoning is difficult to see. If property is exempt, it is exempt. The fact that it is exempt means, a fortiori, that creditors have no right to it.

35. 503 U.S. 638 (1992) (holding that even bad faith claim of exemption is final after passage of thirty days if trustee or creditors do not object).

36. 8 COLLIER ON BANKRUPTCY ¶ 4004.04, at 4003-14 to -15 (Lawrence P. King et al. eds., 15th ed. 1995)

37. Another problem with the opinion is the court's suggestion that the Indiana process for claiming an exemption must be followed in bankruptcy proceedings. *In re Salzer*, 52 F.3d at 711-12.

38. Greene v. Balaber-Strauss, 76 B.R. 940 (S.D.N.Y. 1987), *aff'd*, 859 F.2d 148 (2d Cir. 1988). The trustee in *Salzer* eventually abandoned the exempt asset. *In re Salzer*, 52 F.3d. at 711 n.1.

39. *See, e.g.*, Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845 (1988); Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. COLO. L. REV. 1 (1991); Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989).

40. 47 F.3d 233 (7th Cir. 1995).

can be. As noted in last year's survey article, traditional analysis focuses on whether a transaction is an executory contract.[41] Unless it is, the bankruptcy estate cannot assign the contract under 11 U.S.C. § 365. The traditional approach is problematic when the estate is seeking to take advantage of an asset that does not fit neatly within the definition of an executory contract.[42] The new approach is functional, permitting the bankruptcy estate to act whenever it is advantageous to do so.

In *C&S Grain*, the debtor unsuccessfully sought to assume and assign contracts for the purchase of grain at a fixed price. This request was denied solely because the contracts were no longer executory. According to the court, the debtor's prebankruptcy relinquishment of its grain dealer's license amounted to an anticipatory repudiation of its obligations.[43] At that point, the grain purchase contracts ceased being executory because the repudiation relieved the nondebtor parties of their obligation to perform.

There are two problems with this line of analysis. First, the executory contract analysis is incorrect. A contract does not necessarily cease being executory simply because one party is in breach. The contractual relationship must be terminated prior to bankruptcy.[44] In *C&S Grain*, the nondebtor party had not exercised its right to rescind before bankruptcy. The court incorrectly concluded that breach by the debtor, without anything else, put an end to the contractual relationship between the parties.

Second, and more fundamentally, adherence to the traditional definition of an executory contract (unperformed material obligations on both sides of the transaction) unduly restricts the trustee's ability to take advantage of § 365. The estate should be free to act in any situation when completion of the transaction will be advantageous to the estate. In this instance, the debtor had surrendered its dealer's license leaving it unable to complete the grain purchase. Nonetheless, it should have been permitted to take advantage of the profit opportunity by assigning the purchase rights to a licensed dealer.

IV. CLAIMS

In an interesting case, *In re Penrod*,[45] a creditor filed a secured claim in a

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41. Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1994*, 28 IND. L. REV. 867 (1995).

42. Suppose, for example, that the debtor holds a valuable option to purchase real estate. *See, e.g.*, *In re* G-N Partners, 48 B.R. 462 (Bankr. D. Minn. 1985).

43. *In re C& S Grain Co.*, 47 F.3d at 237. An Illinois statute required that a certain debt to equity ratio was necessary to maintain the grain dealer's and warehouseman's licenses. When C & S Grain experienced financial difficulties, it turned its licenses over to the state. *Id.* at 236. The court found that by turning over its licenses, which were preconditions for the doing of the acts specified in its contracts, C & S Grain made the contracts void. *Id.* at 237. This cut off the inquiry into whether C & S Grain could assign its contractual rights.

44. 2 COLLIER ON BANKRUPTCY, *supra* note 36, ¶ 365.02, at 365.21 to .23.

45. 50 F.3d 459 (7th Cir. 1995).

Chapter 11 proceeding. There was no objection and the claim was allowed. The debtor's treatment of the claim in its plan was inconsistent with its allowed status. *Penrod* held that the treatment in the plan controls. Accordingly, the creditor lost the lien associated with its allowed secured claim.

Penrod is apparently the first court of appeals decision to consider the relationship between the claim process and the confirmation process in Chapter 11 proceedings.[46] This issue has been the subject of a long standing controversy in Chapter 13 proceedings. The majority view is that a confirmed Chapter 13 plan cannot adversely affect the lien rights of an allowed secured claim.[47] The Seventh Circuit, however, adheres to the minority position that a confirmed plan prevails even if its terms are inconsistent with the lien status of the secured claimholder.[48] Thus, the result in *Penrod* is consistent with previous Chapter 13 decisions in this circuit. It represents a minority view, but it has the support of the leading treatise on Chapter 13.[49] One must choose between inconsistent results produced by the claims allowance process and the confirmation process. *Penrod* represents the better view because it reduces the possibility of post-confirmation challenges to the reorganization plan.

Judge Posner carefully limited the holding in *Penrod* to situations in which the lienholder has participated in the bankruptcy. However, he also noted that the secured claimholder may be "dragged into the bankruptcy involuntarily because [another party] . . . may file a claim on the creditor's behalf . . . ."[50] Thus, the limitation he mentioned seems to be of little practical consequence as long as the claimant has adequate notice[51] of the bankruptcy proceeding.

V. SUCCESSOR LIABILITY

Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.,[52] is a successor liability[53] case. Although the result achieved is correct, the reasoning in this rather bizarre opinion is muddled.

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46. The existing authority is reviewed in H. Gray Burks, IV, *Obtaining the Release of Liens Through Reorganization Plans: The Circuit Courts Sharpen the Debate with* Penrod *and* Cen-Pen, NORTON BANKR. L. ADVISER 1 (Clark Boardmon Callaghan, Rochester, N.Y.), Sept. 1995, at 1.

47. 2 LUNDIN, *supra* note 18, § 6.14.

48. *In re* Pence, 905 F.2d 1107 (7th Cir. 1990).

49. "To the extent [that] cases . . . suggest that the confirmation process always gives way to the claims allowance process, these cases are wrongly decided." 2 LUNDIN, *supra* note 18, § 6.10, at 6-22.

50. *In re* Penrod, 50 F.3d 459, 462 (7th Cir. 1995) (citing 11 U.S.C. §§ 501(b),(c) (1994); *In re* Lindsey, 823 F.2d 189, 171 (7th Cir. 1987)).

51. *See In re* Chappell, 984 F.2d 775, 783 (7th Cir. 1993) (holding that a creditor with notice of a bankruptcy proceeding runs risk of losing its claim if it does not bring the claim to the court's attention).

52. 59 F.3d 48 (7th Cir. 1995).

53. Successor liability exists when an asset remains subject to a regulatory burden, e.g., application of labor laws notwithstanding its transfer to a new entity.

Old Tasemkin filed under Chapter 11 in May 1991. This filing triggered ERISA withdrawal liability. New Tasemkin was incorporated for the purpose of acquiring the assets of Old Tasemkin. It did not, however, purchase the assets from the estate. Instead, it acquired the blanket security interest of Northern Trust, obtained relief from stay, and obtained title through the foreclosure of its security interest. The plaintiff then sought to enforce the ERISA liability by applying the successorship doctrine. New Tasemkin argued that this conflicted with bankruptcy policy. The court disagreed.[54] This result is correct. Because New Tasemkin acquired the assets as a successor to the secured creditor, the rehabilitative features of a bankruptcy proceeding were not involved.

Unfortunately, the court did not choose this simple rationale. Instead, it observed, "This case does not directly implicate the Bankruptcy Code, since the underlying bankruptcy proceeding is long over."[55] The court also explained, "Once a bankruptcy proceeding is completed and its book closed, the bankruptcy has ceased to exist and the priorities by which its creditors have been ordered lose their force."[56]

Many discharged individual debtors and reorganizing businesses will be surprised to learn that the effects of bankruptcy evaporate as soon as the case is closed. Of course, there is absolutely no support for such statements.[57]

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54. *Tasemkin*, 59 F.3d at 50.

55. *Id.* at n.2.

56. *Id.* at 51.

57. For a recent discussion of whether successor liability can exist after bankruptcy, see J. Maxwell Taylor, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand that Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1 (1995).

JUDICIAL DEVELOPMENTS IN CORPORATIONS, CONTRACTS, AND COMMERCIAL LAW

BRAD A. GALBRAITH*

INTRODUCTION

This Article surveys several interesting judicial developments in Indiana corporation law, commercial law and contract law from December 1, 1994 through December 1, 1995.

I. CORPORATION LAW—PIERCING THE CORPORATE VEIL

On December 20, 1994, the Indiana Supreme Court reversed a trial court's judgment, and in the process, clarified and simplified the concept of piercing the corporate veil.[1]

A. Factual Background

In April of 1990, Spencer Aronson went to Corbitt's Body Shop to get an estimate on restoring his 1957 automobile to show condition. The estimate did not reveal that Corbitt's Body Shop was owned by Corbitt's Body Shop, Inc., an Indiana Corporation. Kent E. Price and Sandra Price were the sole officers, directors and shareholders of Corbitt's Body Shop, Inc.[2]

A couple of months later, Aronson took his car to the shop to have the restoration work performed. While the car was in the shop, the business name of the shop was changed to Shadow's Body Shop and Aronson was given a business card reflecting the name change. At no time was Aronson told that the body shop was incorporated, nor did any of the shop's signs, business cards or business forms indicate that the shop was incorporated.[3]

In early October, Aronson had the car towed to an automobile paint shop because the car had been damaged while at Shadow's Body Shop.[4] Subsequently, Aronson brought suit against Kent E. Price d/b/a Corbitt's Body Shop, Corbitt's Body Shop, Inc. and Shadow's Body Shop. The trial court entered a joint and several judgment against Price and Corbitt's Body Shop, Inc.[5] In order to enter judgment against Price individually, the trial court pierced the corporate veil based on the following facts:

> (1) the sign on the front of the shop, the business cards, and the receipts did not indicate that the business was incorporated . . . ; (2) neither Price nor his employees informed Aronson that he was dealing with a

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1. Aronson v. Price, 644 N.E.2d 864 (Ind. 1994).
2. *Id.* at 866.
3. *Id.*
4. *Id.*
5. *Id.*

> corporation; and (3) a certificate of assumed name was not filed with the state until May 3, 1991 . . . .[6]

Price appealed the judgment against him personally, and the court of appeals reversed the trial court.[7] In doing so, the court of appeals held that: (1) Indiana Code section 23-1-23-1(a) simply establishes administrative procedures for indicating corporate status in the records of the secretary of state; (2) failure to inform Aronson that the body shop was incorporated does not justify piercing the corporate veil; and (3) failure to comply with Indiana Code section 23-15-1-1 is, by itself, insufficient to justify piercing the corporate veil.[8] Aronson then appealed to the Indiana Supreme Court.

B. The Majority Opinion

The supreme court explained that under certain circumstances, an Indiana court will impose personal liability on a shareholder to protect an innocent third party from fraud or injustice. However, the burden is on the party seeking to impose personal liability to prove that "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice."[9]

> In deciding whether a plaintiff has met this burden of proof, an Indiana court considers whether the plaintiff has presented evidence showing: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.[10]

1. Failure to use Indicator of Corporate Status.—In *Aronson*, the trial court first concluded that the failure of the corporation to include an indicator of corporate status in its name as used on business cards and business forms in violation of Indiana Code section 23-1-23-1[11] exposed corporate shareholders to

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6. *Id.*

7. Price v. Aronson, 629 N.E.2d 268 (Ind. Ct. App. 1994).

8. *Id.* at 270-71.

9. *Aronson*, 644 N.E.2d at 867 (citing Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1232 (Ind. 1994)).

10. *Id.* (citing Eden United, Inc. v. Short, 573 N.E.2d 920, 933 (Ind. Ct. App. 1991), *trans. denied*; Stacey-Rand, Inc. v. J.J. Holman, Inc., 527 N.E.2d 726, 728 (Ind. Ct. App. 1988); State v. McKinney, 508 N.E.2d 1319, 1321 (Ind. Ct. App. 1987)).

11. IND. CODE § 23-1-23-1 (1993). The statute provides in the relevant part that a corporate name:

> (1) must contain the word "corporation", "incorporated", "company", or "limited", or the abbreviation "corp", "inc.", "co.", or "ltd.", or words or abbreviations of like import

personal liability.[12] In reversing the trial court, the supreme court explained that:

> Indiana Code § 23-1-23-1 does not require an Indiana corporation to use words designating its corporate form in its signage, business forms, invoices, or business cards. The requirements of this section of the Indiana Code go only to legal requirements of a corporate name for purposes of issuance of a corporate charter by the Indiana Secretary of State.[13]

In fact, the corporation's official name included a corporate designation, but the name used by the corporation on a daily basis included no such designation. "There is no requirement in the corporate code that a corporation must do business under the name by which it was chartered, and we refuse to read any such requirement into the statute."[14]

2. *Failure to File Assumed Business Name Certificate.*—The *Aronson* trial court based its decision to pierce the corporate veil on the failure of the corporation to file an assumed business name certificate with the county recorder. Although the supreme court concluded that the corporation was indeed in violation of Indiana Code section 23-15-1-1,[15] the court also concluded that such a violation is insufficient to justify imposing personal liability on corporate shareholders.[16] The court explained that "the legislature intended the assumed business name filing requirement to provide information to litigants and others as to the true party in interest when contracts are made or business is done in an assumed name."[17] The court found "no basis in law for imposing personal liability on a shareholder for acts of the corporation solely because the failure of a corporation to file an assumed business name certificate under Indiana Code § 23-15-1-1."[18]

Although it is true that adherence to corporate formalities is a proper consideration when determining whether the corporate veil should be pierced, "[c]orporate formalities for this purpose include proper corporate filings, the

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in another language; and

(2) except as provided in subsection (e), may not contain language stating or implying that the corporation is organized for a purpose other than permitted by IC 23-1-22-1 and its articles of incorporation.

12. *Aronson*, 644 N.E.2d at 868.

13. *Id.*

14. *Id.*

15. IND. CODE § 23-15-1-1 (1993). The statute provides in relevant part that:
a person conducting or transacting business in Indiana under a name, designation, or title other than the real name of the person conducting or transacting such business . . . shall file for record, in the office of the recorder of each county in which a place of business or an office of the . . . corporation . . . is situated, a certificate stating the assumed name to be used and, . . . the address of the corporation's . . . principal office in Indiana.

16. *Aronson*, 644 N.E.2d at 868.

17. *Id.* (citing Humphrey v. City Nat'l Bank, 130 N.E. 273, 277 (Ind. 1921)).

18. *Id.*

issuance of stock, election of directors and officers, shareholders and directors meetings, resolutions authorizing payments and corporate minutes."[19] Because corporate designation on business signs and stationary is not a corporate formality that must be adhered to, failure to designate corporate status on signs and stationary cannot be the basis for piercing the corporate veil. "Thus, the only evidence to support piercing the corporate veil present in this case is the failure to observe the corporate formality of filing an assumed business name certificate . . . . [S]uch evidence alone is insufficient to impose personal liability on a shareholder."[20] Accordingly, the supreme court reversed the trial court's judgment against Price and affirmed the court of appeals.

C. The Dissenting Opinion

Justice Dickson viewed the dispute from a different perspective altogether. In his dissent, Justice Dickson construed the issue as "whether the defendant dealt with the plaintiff on behalf of an undisclosed principal."[21] He noted that "neither the plaintiff's complaint nor the initial trial court judgment makes any mention of 'piercing the corporate veil.'"[22] From this perspective, Justice Dickson concluded that the shareholder, Price, who failed "to disclose from the outset the existence of the corporation," should not be entitled to escape personal liability where the plaintiff, Aronson, was unaware that he was dealing with a corporation.[23]

D. Conclusion

In *Aronson*, the Indiana Supreme Court established a clear and unambiguous approach to determining whether to pierce a corporate veil.[24] Whether piercing the corporate veil should have been an issue on appeal is not nearly so clear.

II. COMMERCIAL LAW—IMPAIRMENT OF COLLATERAL

On June 25, 1995, the Indiana Supreme Court made clear the applicability of the impairment of collateral defense specifically set forth in Indiana's version of the Uniform Commercial Code (UCC), Indiana Code section 26-1-3-606.[25]

A. Factual Background

Robert and Anne Letsinger (the "Letsingers") were shareholders of T-C Crop

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19. *Id.*
20. *Id.* at 869.
21. *Id.* (Dickson, J., dissenting).
22. *Id.*
23. *Id.* at 870 (quoting Record at 38).
24. *Id.* at 864.
25. Farmers Loan & Trust Co. v. Letsinger, 652 N.E.2d 63, 64 (Ind. 1995). Indiana Code section 26-1-3-606 (1993) is a part of Indiana common law that defines situations where the UCC does not apply.

Care, Inc. ("T-C").[26] On November 21, 1982, Farmers Loan & Trust Co. (the "Bank") loaned T-C $32,998.39 in exchange for a promissory note signed by the Letsingers in both their individual capacity and in their business capacity as officers of T-C. The promissory note gave the Bank a security interest in all of T-C's plant, buildings, fixtures and equipment, as well as all additions, accessions, accessories and replacements thereto. The note further gave the Bank a first lien and security interest on any product and proceeds from T-C's present and future accounts receivable and inventory. The Letsingers subsequently signed a separate guaranty on the loan on December 31, 1982.[27]

Two years later, "T-C granted a second lien and security interest in the same corporate property and assets to [another corporation], . . . which lien was duly perfected."[28] Initially, this second lien was subordinate to the lien held by the Bank, but it gained priority when the Bank failed to re-file a financing statement or a continuation statement.[29]

In February 1989, the Letsingers executed renewal notes and a new guaranty for T-C's debt to the Bank. The renewal notes contained a waiver of defenses provision designed to prevent the Letsingers from claiming that the Bank had impaired the security for the loan.[30] Soon thereafter, T-C filed for bankruptcy and the bankruptcy court ordered T-C to liquidate its assets to pay creditors. The majority of the proceeds went to pay the first priority security interest, resulting in a deficiency of $115,554.41 owed to the Bank.[31] The Bank brought suit against the Letsingers to recover the deficiency.

At trial, the court found that the Letsingers had endorsed the promissory notes as accommodation parties.[32] The Letsingers, as accommodating parties to a negotiable instrument, were entitled to the defense of unauthorized impairment of collateral.[33] The trial court found that the Letsingers had not consented to the impairment of collateral that occurred when the Bank allowed its priority interest to lapse and permitted the Letsingers to assert the unauthorized impairment of collateral defense.[34]

In its Petition to Transfer, the Bank did not dispute the trial court's findings with respect to the Letsinger's liability as accommodation parties. Instead, it challenged whether the Letsingers were entitled to the use of an impairment of

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26. *Farmers*, 652 N.E.2d at 64 (quoting Farmers Loan & Trust Co. v. Letsinger, 635 N.E.2d 194, 195-96 (Ind. Ct. App. 1994)).

27. *Id.*

28. *Id.*

29. *Id.* at 64-65.

30. *Id.* at 65.

31. *Id.*

32. *See* IND. CODE § 26-1-3.1-419(c) (Supp. 1995).

33. The relevant part in 1994 was IND. CODE § 26-1-3-606 (1993). Effective July 1, 1994, sections 26-1-3-101 to -805 were repealed. Subsequently, chapter 3.1 contains similar provisions and now the relevant section is IND. CODE § 26-1-3.1-605 (Supp. 1995).

34. *Farmers*, 652 N.E.2d at 65.

collateral defense on the Bank's claim against them as guarantors.[35] The Bank alleged that because the guaranty was a non-negotiable instrument the UCC was therefore inapplicable.[36]

B. Applicability Of The Uniform Commercial Code

"The guaranty executed by the Letsingers was not a negotiable instrument because, *inter alia*, it was an unlimited guarantee, and so not a promise to pay a sum certain."[37] As such, the UCC does not apply and instead, Indiana common law and the law of equity apply.[38]

C. Indiana Common Law and Equity

Because the UCC was inapplicable, the supreme court relied on Indiana common law.[39] The Court found that Indiana has recognized the impairment of collateral defense well before adoption of the UCC noting that:

> In *Stewart v. Davis' Executor* (1862), 18 Ind. 74, we said: It is a well settled principle of equity, that a creditor, who has the personal contract of his debtor, with a surety, and has also, or afterwards takes property from the principal, as a pledge or security for the debt, is to hold the property fairly and impartially, for the benefit of the surety as well as himself, and if he parts with it, without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered.[40]

Furthermore, in *Weed Sewing Machine Co. v. Winchel*,[41] the court said that "[g]uarantors and sureties are exonerated if the creditor by any act, done without their consent, alters the obligation of the principal in any respect, or impairs or suspends the remedy for its enforcement."[42]

The court explained the rationale for allowing a guarantor to assert the impairment of collateral defense. The court stated that:

> [T]he guarantor at the time of making a guaranty may make the judgment that the collateral for the loan to the guarantor's principal will be sufficient to cover the debt. If the creditor impairs the collateral, and the guarantor has not consented to release or other impairment of the

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35. *Id.*

36. *Id.*

37. *Id.* (citation omitted). The relevant section can be found at IND. CODE § 26-1-3.1-104 (a) (Supp. 1995).

38. *Farmers*, 652 N.E.2d at 65.

39. *Id.*

40. *Id.* at 66 (quoting Stewart v. Davis' Executor, 18 Ind. 74, 75-76 (1862)).

41. 7 N.E. 881 (Ind. 1886).

42. *Id.* at 884.

> collateral, the guarantor may become exposed to liability beyond the guarantor's expectation at the time the parties entered into the contract.[43]

In fact, if the priority security interest in corporate property had not been permitted to lapse, the collateral would have covered T-C's debt to the Bank and the Letsingers would not have incurred personal liability.[44]

Additionally, the court explained that "a guarantor who satisfies the principal debtor's obligation to the creditor generally steps into the shoes of the creditor, becoming subrogated to the creditor's claim and assuming both the creditor's rights and duties."[45] As a result, a creditor who impairs its recourse against a debtor cannot pass the consequence of that impairment on to a guarantor. Instead, the creditor must suffer the consequences of its own mistake.

D. Conclusion

In *Farmers Loan & Trust Co. v. Letsinger*, the Indiana Supreme Court found that Indiana law has long provided that when a creditor unjustifiably impairs collateral securing a debt, guarantors of that debt should be discharged to the extent that the creditor has impaired the collateral, regardless of whether the UCC or common law principles apply.

III. CONTRACTS—INDEMNIFICATION CLAUSES

In *Morris v. McDonald's Corp.*,[46] the Indiana Court of Appeals explained the effects of exculpatory and indemnity clauses. The court of appeals reversed the trial court's decision to grant McDonald's Corp.'s ("McDonalds") motion for summary judgment based on exculpatory and indemnity clauses contained in the agreement with McDonalds' franchisee.

A. Factual Background

In February 1993, Morris tripped and suffered personal injuries inside a McDonalds' restaurant operated by a McDonalds' franchisee, GBS Restaurants, Inc. (GBS).[47] The Morrises later filed suit against GBS and McDonalds under claims of negligence, nuisance, and loss of service. McDonalds moved for partial summary judgment asserting the indemnity and exculpation clauses in the lease shielded McDonalds from liability.[48] The trial court granted McDonalds' motion and Morris appealed the judgment.

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43. *Farmers*, 652 N.E.2d at 66.
44. *Id.* at 66-67.
45. *Id.* at 67 (citing Ertel v. Radio Corp. of Am., 307 N.E.2d 471, 474 (Ind. 1974)).
46. 650 N.E.2d 1219 (Ind. Ct. App. 1995).
47. *Id.* at 1221.
48. *Id.*

B. The Effect Of Exculpatory and Indemnity Clauses

McDonalds argued that under the franchise operator's lease, GBS assumed all further liability for occurrences on the premises and therefore, McDonalds was shielded from suit by the Morrises.[49] Even though, McDonalds' argument was faulty, the trial court accepted it and granted partial summary judgment. In its opinion, the court of appeals asserted that "McDonalds' argument demonstrates some confusion between the definition of an exculpatory clause and the definition of an indemnity clause."[50] In fact, neither an exculpatory clause nor an indemnity clause can produce the effect desired and advocated by McDonalds.

"An exculpatory clause covers the risk of harm sustained by the exculpator [here, GBS] that might be caused by the exculpatee [here, McDonalds]. By releasing the exculpatee from liability for such harm, an exculpatory clause deprives the exculpator of its right to recover damages for the exculpatee's negligence."[51] Thus, by agreeing to the exculpatory provision, "GBS relinquished its right to hold McDonalds liable for McDonalds' acts of negligence toward GBS."[52] "On the other hand, an indemnity clause covers the risk of harm sustained by third persons that might be caused by either the indemnitor or the indemnitee. It shifts the financial burden for the ultimate payment of damages from the indemnitee to the indemnitor."[53] Thus, in this case, if the Morrises ultimately prevail against McDonalds, GBS will suffer the consequences.

Therefore, the court concluded that:

> neither an exculpatory nor an indemnity clause [can] shield McDonalds from suit by a third party injured as a result of McDonalds' and/or GBS's negligence. While a party can ordinarily contract out his duty to exercise reasonable care with respect to another contracting party via a simple exculpatory provision, a party cannot contract out his duty to exercise reasonable care with respect to third parties.[54]

Thus, because the Morrises were not parties to the lease between McDonalds and GBS, the provisions of the lease cannot bind them and the exculpatory and indemnity clauses are not determinative of their rights against McDonalds.

C. Conclusion

Although *Morris v. McDonald's Corp.* added little to Indiana's existing law, the opinion highlights the differences between exculpatory clauses and indemnity clauses and clarifies the effects (or lack thereof) that such provisions have on third parties.

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49. *Id.* at 1222.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* (citation omitted).
54. *Id.* at 1222-23.

IV. CONTRACTS—EXCULPATORY CLAUSES

A split of authority developed early in the survey period when the Indiana Court of Appeals apparently disagreed with a previous panel's review of similar facts. In *Pinnacle Computer Services, Inc. v. Ameritech Publishing, Inc.*,[55] the court of appeals re-examined whether an exculpatory provision limiting a party's liability to the contract price or the amount actually paid is unconscionable. The court decided that such an exculpatory provision is not unconscionable.

A. Factual Background

On August 30, 1992, the president of Pinnacle Computer Services, Inc. ("Pinnacle") met with an Ameritech Publishing, Inc. ("Ameritech") representative to place an order for an advertising listing in the Ameritech Pages Plus directories ("Yellow Pages").[56] When the Yellow Pages were published, the listing was mistakenly printed under the wrong heading. Pinnacle filed suit to recover its damages and Ameritech moved for summary judgment based upon an exculpatory provision on its order form.[57] The exculpatory clause read as follows:

> PUBLISHER'S LIABILITY: . . . IF PUBLISHER SHOULD BE FOUND LIABLE FOR LOSS OR DAMAGE DUE TO A FAILURE ON THE PART OF THE PUBLISHER OR IT DIRECTLY, IN ANY RESPECT, REGARDLESS OF WHETHER CUSTOMER'S CLAIM IS BASED ON CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, THE LIABILITY SHALL BE LIMITED TO AN AMOUNT EQUAL TO THE CONTRACT PRICE FOR THE DISPUTED ADVERTISEMENTS, OR THAT SUM OF MONEY ACTUALLY PAID BY THE CUSTOMER TOWARD THE DISPUTED ADVERTISEMENTS, WHICHEVER SUM SHALL BE LESS, AS LIQUIDATED DAMAGES AND NOT AS A PENALTY, AND THIS LIABILITY SHALL BE EXCLUSIVE . . . .[58]

The trial court granted Ameritech's motion and Pinnacle appealed.[59]

B. Enforceability of Exculpatory Clauses

On appeal, Pinnacle argued that the exculpatory clause relied upon by Ameritech was unconscionable and unenforceable as against public policy.[60] As an introductory matter, the court explained that:

> As a general rule, the law allows persons of full age and competent understanding the utmost liberty of contracting and their contracts, when

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55. 642 N.E.2d 1011 (Ind. Ct. App. 1994).
56. *Id.* at 1012.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 1013.

> entered into freely and voluntarily, are enforced by the courts. . . . Accordingly, the parties to a contract are free to include in the agreement any provisions they desire so long as such provisions do not offend the public policy of this state.[61]

Thus, it is possible to "contract out of" the duty to exercise reasonable care.[62] "Although no public policy exists to prevent contracts containing exculpatory clauses, some exceptions do exist where the parties have unequal bargaining power, the contract is unconscionable, or the transaction affects the public interest . . . ."[63]

C. Pigman v. Ameritech Publishing, Inc.

Pinnacle Computer Services, Inc. is interesting because the Indiana Court of Appeals had previously decided a similar case concerning the same disputed exculpatory clause. In *Pigman v. Ameritech Publishing, Inc.*,[64] the court sided with a minority of jurisdictions and held that the provision in question was unconscionable and void as against public policy.[65]

In declining to follow *Pigman*, the court in *Pinnacle* explained that "a standardized contract is not unenforceable merely because of the unequal bargaining power of the parties. There must also be a showing that the contract is unconscionable."[66] "A contract will be held void as against public policy only where one party is at such a disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence."[67] "In addition, the contract must be one that no sensible person not under delusion, duress or in distress would make, and one that no honest and fair person would accept."[68]

In *Pinnacle*, although Ameritech's publication was the only Yellow Pages directory in the Evansville area, other means of advertising were available. Also, Pinnacle had dealt with Ameritech for several years and was not an uninformed customer.[69] In brief, the court concluded that the circumstances were not such that Pinnacle should be permitted to escape the effect of the exculpatory clause contained in the order form.

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61. *Id.* at 1013-14 (citing Fresh Cut, Inc. v. Fazli, 630 N.E.2d 575, 577 (Ind. Ct. App. 1994)).

62. *Id.* (citing *Fresh Cut, Inc.*, 630 N.E.2d at 578).

63. *Id.* at 1014.

64. 641 N.E.2d 1026 (Ind. Ct. App. 1994).

65. *Id.* at 1035.

66. *Pinnacle*, 642 N.E.2d at 1016 (citing Rumple v. Bloomington Hosp., 422 N.E.2d 1309, 1313 (Ind. Ct. App. 1981), *trans. denied*).

67. *Id.* (citing LaFrenz v. Lake City Fair Bd., 360 N.E.2d 605, 608 (Ind. Ct. App. 1977)).

68. *Id.* at 1017 (citing Weaver v. American Oil, 276 N.E.2d 144, 146 (Ind. 1971)).

69. *Id.* at 1016.

D. Conclusion

While *Pinnacle* compiles and explains Indiana law on unconscionability, it adds little to Indiana's existing law. However, the split of authority on whether the particular exculpatory clause used in Ameritech Publishing's order forms is unconscionable and unenforceable may make for an interesting case in the future.

1995 Federal Civil Practice And Procedure Update For Seventh Circuit Practitioners

John R. Maley*

Introduction

Indiana practitioners litigating in federal court during 1995 experienced a year of continued adjustment to drastic changes imposed in recent years. With the sweeping revisions to the Federal Rules of Civil Procedure taking effect December 1, 1993, with local rules changes and civil justice reform plans in effect, and with numerous important decisions from the Seventh Circuit and Indiana district courts, it was no easy task for practitioners to remain current in federal civil procedure. This Article analyzes these developments to assist Indiana attorneys in their federal civil litigation.

The subjects are presented in the order in which they often arise in litigation. Complex or difficult issues are thoroughly analyzed, while straightforward but novel developments are merely highlighted. For ease of future reference, the following table of contents outlines the subjects discussed:

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I. Removal

Although it should be a simple process, removal continues to be a hotly litigated matter. Several 1995 decisions reveal the challenges confronting practitioners involved in removing actions from state to federal court.

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In *Macri v. M&M Contractors*,[1] Judge Miller remanded a removed action to state court due to procedural defects, and assessed costs on remand. The decision provides a good summary of important removal principles.

In *Macri*, plaintiff had filed a breach-of-contract action in state court. Defendant removed on the basis of diversity jurisdiction within the thirty-day limit of 28 U.S.C. § 1446(b), but failed to sign the petition, file a copy in state court, or serve plaintiff. Plaintiff moved to remand, and defendant tried to cure these procedural defects.

Judge Miller rejected the attempt to cure the removal defects, reasoning that defendant failed to cure during the thirty-day removal period. He held that such procedural defects can be cured within thirty days from receipt of the complaint, but thereafter remand is required unless plaintiff waives the defects.[2]

Judge Miller also ordered defendant to pay plaintiff's costs and fees in obtaining remand. Pursuant to 28 U.S.C. § 1447(c), remand orders "may require payment of just costs and actual expenses, including attorney fees, incurred as a result of removal." Noting that other courts have assessed costs on remand where removal was procedurally defective, defendant was ordered to pay full costs and fees, even though Judge Miller did not find bad faith.[3]

Another removal battle arose in *Reason v. General Motors Corp.*,[4] in which Judge Hamilton issued a comprehensive opinion with important holdings. To understand the case, some background is necessary. Plaintiffs, husband and wife, filed suit in state court against GM alleging personal injuries from a car accident. The wife alleged enhanced injuries from her seat- belt. The husband asserted a loss of consortium claim. In compliance with Indiana Trial Rule 8(A)(2), plaintiffs did not allege a specific dollar amount of damages.[5]

GM timely removed the action, stating in its removal notice that plaintiffs were residents of Indiana, that GM was a citizen of Delaware and Michigan for diversity purposes, and that "[b]ased on the allegations of plaintiff's Complaint, if proved, the amount in controversy exceeds $50,000."[6] Plaintiffs' complaint alleged "severe injuries, including but not limited to, injuries to her head and mouth, a broken nose, a broken left knee, a broken left leg, and a broken right wrist," as well as "great physical and emotional pain and suffering."[7]

Plaintiffs timely filed a motion to remand, contending that the amount in controversy did not exceed $50,000. Plaintiffs submitted an affidavit stating that they were not seeking damages in excess of $50,000 against GM. Plaintiffs also stated that they had settled their claim against the other driver for $42,500. GM responded, asserting that unless plaintiffs were seeking less than $7,500 from GM,

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1. 897 F. Supp. 381 (N.D. Ind. 1995).
2. *Id.* at 383.
3. *Id.* at 384-85.
4. 896 F. Supp. 829 (S.D. Ind. 1995).
5. *Id.* at 830-31.
6. *Id.*
7. *Id.* at 835.

jurisdiction was present.[8]

The following subparts analyze the holdings in *Reason.*

A. Citizenship

Although not the main focus of the opinion, Judge Hamilton noted that the removal notice did not establish diversity of *citizenship*, but instead spoke to residence. Although many diversity filings—complaint or removal notice—refer to residence of the parties, diversity jurisdiction requires diversity of citizenship, and citizenship and residence are not the same test (although they oftentimes suggest the same result).[9] The Seventh Circuit has harped on this issue before,[10] so practitioners are advised to speak exclusively in terms of citizenship in the diversity jurisdiction context.

B. Post-Removal Affidavits

Following the Seventh Circuit's directive in *In re Shell Oil Co.*,[11] Judge Hamilton held that plaintiffs' post-removal affidavit attempting to limit their damages to $50,000 was of no moment.[12] As the Seventh Circuit explained in *Shell*, "litigants who want to prevent a removal must file a binding stipulation or affidavit with their complaints."[13]

C. Specificity In Removal Notice

After plaintiffs moved to remand, GM relied on the allegations of the complaint, the size of plaintiff's settlement with the non-party driver, and citations to cases involving large jury awards for enhanced injuries in seat-belt cases. GM did not otherwise offer any evidence on the amount in controversy. Although he observed that there was a "possibility" that the amount at issue exceeded $50,000, Judge Hamilton ruled that GM's removal notice did not meet the standard for establishing to a *reasonable probability* that the amount in controversy exceeded $50,000.[14]

The court strictly applied the reasonable probability standard. As a result, practitioners seeking to stay in federal court should do more to demonstrate that plaintiff's damages exceed $50,000. Possible options include submitting medical records, medical expenses, discovery responses, or other evidence.

D. Aggregation of Consortium Claims

Although criticized by commentators, federal law appears settled that separate

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8. *Id.* at 831.
9. *Id.* at 834-35.
10. Poulos v. Naas Foods, 959 F.2d 69, 70 n.1 (7th Cir. 1992).
11. 970 F.2d 355 (7th Cir. 1992).
12. *Reason,* 896 F. Supp. at 831-33.
13. *In re Shell Oil Co.,* 970 F.2d at 356.
14. *Reason,* 896 F. Supp. at 833-34.

and distinct claims cannot be aggregated for computing the amount in controversy.[15] In *Reason* the issue thus arose as to whether the wife's claim and the husband's consortium claim were separate and distinct so as to preclude aggregation. Analyzing Indiana law, Judge Hamilton concluded that consortium claims are separate and distinct. Thus, the two could not be added together to surpass the $50,000 threshold.[16]

E. Aggregation of Non-Party Settlement

Finally, the court ruled that where plaintiff has settled with a non-party for $42,500, that does not establish that the amount in controversy as to the remaining defendant exceeds $50,000. The court refused to aggregate the claims, again relying on the "separate and distinct" rule that precludes aggregation.[17]

Three months later Judge Hamilton again addressed removal in *Harmon v. OKI Systems*,[18] holding that: (1) defects in defendants' failure to allege the parties' citizenship were waived by plaintiff's failure to raise them within 30 days of removal; (2) such defects could be cured post-removal; and (3) defendants' failure to allege more than $50,000 in controversy was also waivable and could be cured where plaintiff failed to timely raise the issue, and where the evidence demonstrated that, at the time of removal, the amount in controversy exceeded $50,000.

The *Macri*, *Reason,* and *Harmon* opinions are important for federal practitioners involved in removal or remand. Because remand decisions are rarely reviewable, there is sparse Seventh Circuit law on the subject, therefore these decisions stand as strong precedent in Indiana federal courts.

II. DEFAULTS—DON'T ALWAYS MEAN VICTORY

Judge Miller's decision in *Larance v. Bayh*,[19] serves as a reminder that defaults do not always result in victory. Three prisoners sued their keepers, who failed to answer. A default was entered, which prompted a motion to set aside the default. Judge Miller granted the motion, reasoning that "even after default it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law."[20] Because plaintiff's complaint failed to state a cognizable claim for relief, Judge Miller vacated the default and dismissed the action with prejudice.[21]

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15. *E.g.*, Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir. 1990).
16. *Reason,* 896 F. Supp. at 833.
17. *Id.* at 831.
18. 902 F. Supp. 176 (S.D. Ind. 1995).
19. No. 3:94-cv-182RM, 1995 WL 46718 (N.D. Ind. Jan. 18, 1995).
20. *Id.* at *1.
21. *Id.*

III. TRANSFER

Motions to transfer actions from one district to another, though rarely granted, are often filed. A rare but possibly more successful motion, however, is the motion to transfer from one *division* within a district to another *division.*

Such a motion was filed by the defense in *Maddry v. NBD Bank*,[22] and transfer from the Hammond Division to the South Bend Division was granted by Magistrate Judge Rodovich. In *Maddry* plaintiffs filed a diversity action in the Hammond Division. NBD's principle office was in Elkhart, within the South Bend Division. NBD sought to move the action to the South Bend Division, contending that it would be more convenient for the parties and witnesses, pursuant to 28 U.S.C. § 1404(a), to litigate in South Bend.[23]

Judge Rodovich agreed in a case of first impression in the Seventh Circuit, reasoning that although venue was proper anywhere in the Northern District (including Hammond), it would be more convenient for the parties and witnesses to litigate in South Bend. Indeed, none of the parties or witnesses resided in the Hammond Division, and none of the actions complained of occurred in the Hammond Division. By contrast, NBD was located in the South Bend Division, potential defense witnesses were located in the South Bend Division, and plaintiffs resided in Wisconsin and California, thus requiring them to travel substantial distance regardless of whether the action proceeded in South Bend or Hammond. In balancing these factors, Judge Rodovich concluded that South Bend was a more appropriate forum.

IV. DISCOVERY—RULE 35 EXAMS

In *Taber v. Central Rent-A-Crane*,[24] a 1992 unpublished decision reported on Westlaw in 1995, Magistrate Judge Pierce ordered plaintiff to submit to a Rule 35 physical and mental examination. Plaintiff resisted the exam, contending that the doctors selected by defendant were not independent. The court rejected this argument. Notably, nothing in Rule 35 requires the examining doctor to be "independent," and indeed in most cases the doctor is retained by and paid for by defendant and, presumably, not independent. Rule 35 exams are powerful discovery tools for defendants, and should be considered in any case involving physical or mental damages.

V. EXPERTS

As discussed in prior Articles,[25] the Supreme Court's 1993 decision in

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22. No. 2:94-cv-155 (N.D. Ind. Feb. 14, 1996).

23. Section 1404(a), commonly invoked in efforts to transfer cases to other districts, also applies by its plain language to intra-district divisional transfers, stating: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district *or division* where it might have been brought." (emphasis added).

24. No. S91-66, 1992 WL 712781 (N.D. Ind. March 5, 1992).

25. *E.g.*, John R. Maley, *1993 Federal Practice and Procedure Update for Seventh Circuit*

Daubert v. Merrell Dow Pharmaceuticals, Inc.[26] changed the standard for addressing the admissibility of expert testimony. The old *Frye* rule of "general acceptance" was abandoned in favor of a more flexible but probably more restrictive standard focusing on the scientific, technical, or otherwise specialized basis of the testimony.[27] *Daubert* also emphasized the district judge's responsibility to serve as "gatekeeper" and screen out expert testimony that does not satisfy the *Daubert* standards.

As expected, there has been much litigation on the issue since *Daubert*, and the real battlefield is in the trial court. The following cases illustrate the profound effects of *Daubert*:

(a) In *Buckner v. Sam's Club, Inc.*,[28] a slip-and-fall case, the Seventh Circuit affirmed Judge Tinder's exclusion of proffered expert testimony regarding causation. Plaintiff claimed to have slipped on a small object on the floor, but that object was never seen nor found. In resisting summary judgment, Plaintiff offered an affidavit from a safety management expert, who opined that Plaintiff had fallen "as a direct result of stepping on a watch that had been dropped or knocked off the display." In granting and affirming summary judgment for Sam's Club, both Judge Tinder and the Seventh Circuit excluded this conclusory affidavit because it "provided no scientific or technical knowledge that would assist the trier of fact."[29]

(b) In *Deimer v. Cincinnati Sub-Zero Products, Inc.*,[30] a nurse tripped over an electric cord on a hypothermia machine, and sued the manufacturer for negligence and products liability. At trial, the district court excluded the plaintiff's liability expert. On appeal, the Seventh Circuit affirmed, reasoning that the expert "did not conduct any studies or analysis to substantiate his opinion."[31] He merely offered "unverified statements that were unsupported by any scientific method," thus making his opinion inadmissible under *Daubert*.[32]

(c) In *Gruca v. Alpha Therapeutic Corp.*,[33] the Seventh Circuit held that the district court erred by failing to conduct the *Daubert* gatekeeper analysis in admitting expert testimony. The *Gruca* decision

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Practitioners, 27 IND. L. REV. 813, 833-36 (1994).

26. 509 U.S. 579 (1993).
27. The *Frye* rule stemmed from Frye v. United States, 293 F. 1013 (1923).
28. 75 F.3d 290 (7th Cir. 1996).
29. *Id.* at 293.
30. 58 F.3d 341 (7th Cir. 1995).
31. *Id.* at 344.
32. *Id.* at 345.
33. 51 F.3d 638 (7th Cir. 1995).

confirms that, as directed by *Daubert*, district courts cannot abdicate their responsibilities to ensure that expert testimony is properly scrutinized.

(d) In *Smith v. Ford Motor Co.*,[34] Judge Lee held that plaintiff's liability expert in a products liability action satisfied the *Daubert* standards. The decision shows that defendants do not always prevail in the *Daubert* battle.

(e) In *A Woman's Choice-East Side Women's Clinic v. Newman*,[35] Judge Hamilton applied the *Daubert* criteria and allowed an expert to testify regarding the burdens that Indiana's abortion statute could impose on those seeking abortions. The opinion is a good example of an Indiana district judge applying the *Daubert* standards to a relatively unique situation.

(f) Other notable *Daubert* decisions include the following: (i) expert testimony regarding herbicides causing personal injury was rejected due to lack of sufficient empirical evidence;[36] (ii) proffered expert testimony regarding hedonic damages was excluded in a case of first impression in the Seventh Circuit;[37] (iii) due to a lack of supporting evidence and analysis, an expert was prohibited from testifying that a transdermal nicotine patch caused plaintiff's heart attack;[38] and (iv) a doctor was prohibited from offering his subjective beliefs based solely on his own personal observations.[39]

VI. Summary Judgment Deadlines

In an opinion that begins by quoting the 1959 song: "what a difference a day makes . . . twenty-four little hours," the Seventh Circuit affirmed summary judgment in a civil-rights action based in part on the non-movant's failures to timely file his summary judgment materials. The decision in *Spears v. City of Indianapolis*[40] is a reminder that federal judges, though often very patient, can be pushed too far on missing deadlines, and that the consequences for late filings can be severe.

The case, filed in the Southern District of Indiana in 1991, proceeded through "two years of swimming in the sea of discovery."[41] Then, on January 3, 1994, the

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34. 882 F. Supp. 770 (N.D. Ind. 1995).
35. 904 F. Supp. 1434 (S.D. Ind. 1995).
36. Schmaltz v. Norfolk & W. Ry., 878 F. Supp. 1119 (N.D. Ill. 1995).
37. Ayers v. Robinson, 887 F. Supp. 1049 (N.D. Ill. 1995).
38. Rosen v. Ciba-Geigy Corp., 892 F. Supp. 208 (N.D. Ill. 1995).
39. Zarecki v. National Railroad Passenger Corp., 914 F. Supp. 1566 (N.D. Ill. 1996).
40. 74 F.3d 153 (7th Cir. 1996).
41. *Id.* at 156.

City filed a properly supported motion for summary judgment. Plaintiff's response was due fifteen days later pursuant to the Southern District of Indiana Local Rule 56.1. Plaintiff sought an extension, and over the City's objection, Judge Tinder gave plaintiff until February 22, 1994, to respond.[42]

Plaintiff did not meet the deadline, this time seeking an extension due to an intervening federal holiday (President's Day) and the number of exhibits he desired to file. Over the City's objection, Judge Tinder granted the extension until March 1, 1994.[43]

On that date, plaintiff filed a brief, but it did not include affidavits or other documentary evidence contravening the movant's evidence as required by Local Rule 56.1. Citing a "catastrophic computer failure," plaintiff filed an "emergency" motion asking for one extra day to file his evidence.[44] Some supporting documentation was filed the next day, but the filings did not end. A week later, an amended response brief and amended designation of evidence was filed. The City objected and moved to strike the materials.[45]

In a comprehensive decision, Judge Tinder granted summary judgment, and in so doing addressed the belated filings. First, the court denied the "emergency" motion for more time. Second, he granted the motion to strike the new supporting materials, but denied the motion to strike the amended brief. The court thus did not consider evidence filed after the March 1 due date, and accordingly accepted the City's facts as true.[46]

On appeal, the Seventh Circuit approved of Judge Tinder's rulings, finding no abuse of discretion. The panel noted that we "live in a world of deadlines," and that the "practice of law is no exception."[47] Although both Judge Tinder and the Seventh Circuit expressed sympathy with counsel's problems, the Seventh Circuit wrote, "[I]t seems to us that the problem was really that he waited until the last minute to get his materials together. [He] apparently neglected the old proverb that 'sooner begun, sooner done.'"[48] The Seventh Circuit added that "[d]eadlines, in the law business, serve a useful purpose and reasonable adherence to them is to be encouraged."[49]

The lessons of *Spears* are obvious, but are worth repeating. Deadlines in federal court should not be taken lightly, and when it appears that extensions are necessary, they should be sought well before the deadline if possible, and should include the reasons an extension is necessary. Notably, the *Spears* decision is not the first of its type; Indiana courts are strict on summary judgment, forbidding late designation of evidence at summary judgment hearings.

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 157.
48. *Id.*
49. *Id.*

VII. TRIAL

A. Peremptory Strikes

In *Purkett v. Elem*,[50] the Supreme Court held that no *Batson*[51] violation occurred where the prosecution struck two black prospective jurors. The Court accepted the prosecution's proffered explanation that the strikes were made because of the jurors' unkempt hair, looks, moustaches, and beards, and were thus race-neutral. The Court held that the race-neutral explanation need not be persuasive or even plausible. The opponent of the strike must ultimately prove purposeful discrimination.

B. Special Verdict Forms

In *Blue Cross v. Marshfield Clinic*,[52] the Seventh Circuit—in the midst of an important antitrust decision that is a must read on that narrow score for health-care practitioners—addressed the broader subject of special verdicts. In this complicated case, the jury answered a special verdict form containing eighteen questions. Chief Judge Posner had this to say about the format of the special verdict form:

> As a detail, we urge the bench and bar of this circuit not to imitate the special verdict on liability that went to the jury in this case. The verdict form contained 18 questions. If the jury wanted to find for the plaintiff on every contested point, all it had to do (and all it did do) was write "yes" 18 times. A verdict so configured, like a plea colloquy in which the answer that the defendant is expected to give to every one of the judges's questions is 'yes,' invites rote answers rather than the careful consideration of the structure of the plaintiff's case that the use of a special verdict is intended to foster. None of the purposes ascribed to the giving of a special verdict, of which probably the most important is to minimize the likelihood or scope of a retrial in a case in which there is more than one independent ground for recovery, are served by a verdict form that does not invite the jurors to use their heads.[53]

Although critical of the form, the court did not find error on this basis. Judge Posner explained:

> Given the broad discretion of the trial judge in the formulation of special verdicts, and the fact that no objection was made to the form employed here, we do not suggest that this form would have constituted reversible error if the point had been argued; we merely offer for what it is worth our belief that it is not the best possible form, because it does not force jurors

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50. 115 S. Ct. 1769 (1995).
51. Batson v. Kentucky, 476 U.S. 79 (1986).
52. 65 F.3d 1406 (7th Cir. 1995).
53. *Id.* at 1416-17 (citations omitted).

to think before filling it out.[54]

VIII. POST-JUDGMENT

A. Post-Judgment Rules

Rules 50, 52, and 59 of the Federal Rules of Civil Procedure were amended in 1995 to provide a uniform filing date for these post-judgment rules. Under the current version of the rules, these motions are due within a ten-day period, but the rules differ on what must be done within ten days. One rule requires the motion to be "served," another "made," and still another "served and filed."[55]

Fortunately this unnecessary confusion was cured effective December 1, 1995. Under the amendments to Rules 50, 52, and 59, each of these post-judgment motions, if pursued, must be *filed* within ten days of entry of judgment. Note well that as under current law, these ten-day time periods *cannot* be extended per Federal Rule of Civil Procedure 6(b).

Also, note that Federal Rule of Appellate Procedure 4(a) is amended to reflect that the timely *filing* of a post-judgment motion tolls the time for appeal. The prior version of the rule stated that the timely making of such a motion tolled the time for appeal.

B. Fee Petitions

In *Johnson v. Lafayette Fire Fighters*,[56] the prevailing plaintiffs sought attorneys fees in the trial court under 42 U.S.C. § 1988, but did not timely file their petition within the provisions of amended Federal Rule of Civil Procedure 54(d) (requiring fee petitions to be filed within fourteen days of judgment unless otherwise provided by statute or "order of court"). Chief Judge Sharp allowed the petition and granted fees, reasoning that the Northern District's local rule providing for ninety days to file fee petitions was an "order of court" falling within Rule 54(d)(2)'s exception.[57]

On appeal, the Seventh Circuit affirmed, holding that "at least for the purposes of Fed. R. Civ. P. 54(d)(2)(B), a local rule is an order of the court."[58] Curiously, the Seventh Circuit did not mention that in other parts of the 1993 rules package, the amended rules specifically mention orders of court and local rules separately (e.g., Federal Rule of Civil Procedure 26(a)(1)), which would lead to a reasonable argument that when Rule 54(d) mentions only "order of court" as an exception to the 14-day limit, it thus excludes local rules.

In any event, the Seventh Circuit has spoken on the issue. Nonetheless, parties seeking fees should still seek to file their fee petitions within fourteen days,

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54. *Id.* at 1417.
55. *See* FED. R. CIV. P. 50, 52 & 59.
56. 51 F.3d 726 (7th Cir. 1995).
57. *Id.* at 728.
58. *Id.* at 729.

or seek an extension (through an "order of court"), which is permissible under the rule.

IX. APPEALS

A. Docketing Statement

During 1995, Seventh Circuit Rule 3(c) was amended to change the name of the initial "jurisdictional statement" filed with the notice of appeal to a new "docketing statement." This statement is due at the time of filing the notice of appeal in the district court. Significantly, the amended rule provides that counsel will be fined $100 for failure to file the docketing statement within fourteen days of the notice of appeal. Furthermore, if the statement is not filed within twenty-eight days of the notice, the appeal will be dismissed.[59]

B. Standard of Review

Seventh Circuit Rule 28(k) formerly required the appellant's brief to contain a statement of the standard of review. This has been deleted from Circuit Rule 28, but the requirement remains found in Federal Rule of Appellate Procedure 28.

C. Specificity In District Court Orders

Seventh Circuit Rule 50 was amended to provide that whenever a district court issues an order terminating the litigation or otherwise renders an appealable order, the judge shall specify the reasons either orally on the record or in writing. When the district court fails to do so, the Seventh Circuit "urges the parties to bring to this court's attention as soon as possible any failure to comply with this rule."[60]

Presumably the Seventh Circuit wants to know about such deficiencies as early as the filing of the notice of appeal so that, if necessary, the Seventh Circuit can direct the district court to promptly supplement its ruling.

D. Cross Appeals

With an amendment to Seventh Circuit Rule 28(g), cross-appellants will no longer automatically have the right to file three briefs (e.g., appellee's brief, cross-appellant's brief, and cross-appellant's reply brief). The court will designate which party is to file the opening brief when a cross appeal is filed, and the responding party will have only one opportunity to file a combined fifty-page response brief resisting the other party's appeal and setting forth its own appeal. Although it sounds confusing, the net effect is that the party who is designated by the clerk for the "opening brief" can file two briefs, while the other party will only get to file one. There is some concern among the bar that this will lead to a race to the courthouse in an effort to obtain the lower numbered appeal (thus in theory enhancing the prospects of being the party designated to file the opening brief).

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59. 7TH CIR. R. 3(c).
60. 7TH CIR. R. 50.

It remains to be seen whether this fear is justified. The amended rule does provide that the court will entertain motions for realignment of the briefing schedule and enlargement of page limitations when the norm established by the rule proves "inappropriate."

Finally, amended Seventh Circuit Rule 28(g) specifically warns that "it is improper to take a cross-appeal in order to advance additional arguments in support of a judgment."[61] Cross-appeals are proper only when the cross-appellant seeks to enlarge its rights under the judgment.

E. Deficient Briefs: Filers Beware

In *United States v. Sosa*,[62] appellant obtained two extensions to file his brief. On the due date, he filed a three page document that lacked most of the required components of an appellate brief. Then, seven days later, he filed a slightly longer but still deficient brief.

The Seventh Circuit rejected the purported brief and ordered the appellant to show cause why the appeal should not be dismissed. The panel explained that although a 1994 amendment to Federal Rule of Appellate Procedure 25 prohibits the clerk from rejecting filings, when a purported brief does not meet the requirements for appellate briefs, it will be disregarded and no automatic seven-day extension to cure will be granted. The court concluded, "[p]arties to litigation in this court will not be permitted to obtain an automatic seven-day extension of time for filing briefs by filing a document that pretends to be a brief, hoping that we will allow the real brief to be filed seven days later."[63]

F. Honest Statement of Facts

In *Avitia v. Metropolitan Club of Chicago*,[64] Chief Judge Posner offered the following passage, which appellate counsel should heed:

> As a reminder to future appellants, we point out that a statement of facts which, as the Club's does, treats contested testimony of the losing party's witnesses as 'facts' violates Cir. R. 28(d)(1). We have not yet stricken a brief for a violation of this rule, but let this opinion be a warning that we have the power, and may one day have the inclination, to do so. We are not sticklers, precisians, nitpickers, or sadists. But in an era of swollen appellate dockets, courts are entitled to insist on meticulous compliance with rules sensibly designed to make appellate briefs as valuable an aid to the decisional process as they can be. A misleading statement of facts increases the opponent's work, our work, and the risk of error.[65]

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61. 7TH CIR. R. 28(g).
62. 55 F.3d 278 (7th Cir. 1995).
63. *Id.* at 279-80.
64. 49 F.3d 1219 (7th Cir. 1995).
65. *Id.*

G. Appeals of Class Certification Orders

An order certifying or refusing to certify a class action is not a final appealable order under 28 U.S.C. § 1291. Nonetheless, in *In re Rhone-Poulenc Rorer, Inc.*,[66] a divided panel of the Seventh Circuit took the extraordinary measure of granting a writ of mandamus, and ordered the class decertified. The complicated case is a must read for anyone involved in class litigation.

H. Appellate Sanctions

Rule 38 of the Federal Rules of Appellate Procedure allows appellate courts to award "just damages and single or double costs to the appellee" for a frivolous appeal. In *Ashkin v. Time Warner Cable*,[67] the Seventh Circuit assessed Rule 38 sanctions against plaintiff and her appellate counsel for seeking reversal based essentially on factual issues.

The case was tried to Magistrate Judge Endsley, who found as a factual matter that Time Warner did not discriminate against Ashkin in her termination. After trial, Time Warner's counsel wrote Ashkin's trial counsel, alerting her of the Seventh Circuit's decision in *Rennie v. Dalton*,[68] in which an Indianapolis attorney was assessed Rule 38 sanctions for asking the Seventh Circuit to reverse based on credibility issues. Time Warner's counsel included a copy of the *Rennie* decision, and warned that Rule 38 sanctions would be sought if an appeal was taken.[69] Apparently mindful of *Rennie*, Ashkin's trial counsel did not pursue the appeal. Ashkin initiated the appeal pro se, and later hired Chicago counsel to pursue the appeal.

As in *Rennie*, the Seventh Circuit affirmed the trial court judgment, and proceeded to assess Rule 38 sanctions because the "instant case is indistinguishable" from *Rennie*.[70] The court wrote, "Once the magistrate judge concluded that Ashkin was not credible, and had therefore failed to prove the elements of her claim, the possibility of success on appeal was virtually non-existent."[71] The Seventh Circuit specifically noted that Ashkin had been warned of *Rennie*, and that trial counsel had declined to participate in the appeal. Thus, the court ordered Ashkin and her counsel to each pay half of Time Warner's appellate costs and fees.[72]

The lessons of *Ashkin* are three-fold. First, if an appeal essentially seeks to re-weigh evidence, it is a candidate for quick affirmance and Rule 38 sanctions. Second, after obtaining a judgment involving underlying factual determinations, providing opposing counsel with a warning letter with copies of *Rennie* and *Ashkin* enhances the probabilities of Rule 38 sanctions. Finally, when trial counsel

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66. 51 F.3d 1293 (7th Cir. 1995).
67. 52 F.3d 140 (7th Cir. 1995).
68. 3 F.3d 1100 (7th Cir. 1993).
69. *Ashkin*, 52 F.3d at 146.
70. *Id.*
71. *Id.*
72. *Id.*

withdraws from the case, extra caution and scrutiny is warranted before pursuing the matter further on appeal; this is often a sign that the appeal is doomed.

X. SANCTIONS

In *Hedrick v. Comptroller*,[73] an unpublished decision, the Seventh Circuit affirmed Judge Dillin's award of Rule 11 sanctions against plaintiff's counsel. First, the court ruled that the sanctions motion was timely, having been filed within a reasonable time after discovery of the violation.[74] Second, the court found that plaintiff's motion to compel discovery was inherently defective because the underlying subpoenas were clearly defective, and were improperly served without sufficient advance notice.[75] Although the case was decided under the more stringent pre-1993 version of Rule 11, it serves as a reminder that federal courts are not tolerant of frivolous filings.

XI. MISCELLANEOUS

A. Standing Orders

Rule 83 of the Federal Rules of Civil Procedure was amended in 1995 to include the following new subdivision:

> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. § 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.[76]

The same limitation is now found in amended Federal Appellate Rule 47(b).

These amendments stem from the proliferation of unpublished standing orders and directives in many courts. With the amendment, parties and their counsel cannot be bound by such directives and standing orders unless they were given actual notice of those requirements in the case at issue.

B. State-Law Privileges

In *In re March 1994 Special Grand Jury*,[77] Chief Judge Barker addressed an interesting privilege issue. A federal grand jury was investigating allegations that a claimant made false claims in pursuing two slip-and-fall cases. One of those cases was mediated by a mediator/attorney under Indiana's Alternative Dispute Resolution Rules (ADR). The federal prosecutor subpoenaed the mediator to

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73. 68 F.3d 477 (7th Cir. 1995).
74. *Id.*
75. *Id.*
76. FED. R. CIV. P. 83.
77. 897 F. Supp. 1170 (S.D. Ind. 1995).

testify before the grand jury regarding statements made by the claimant during mediation. The mediator moved to quash the subpoena, relying on the mediator privilege of the ADR Rule 2.12.[78]

Judge Barker denied the motion to quash, reasoning first that the ADR rule on its face does not apply to criminal proceedings. She further ruled that state privileges, although entitled to consideration in federal court as a matter of comity, are not binding in federal cases where state-law does not serve as the governing law. Finding that the federal interest of federal law enforcement and fact-finding would be hindered by application of the state-law privilege, Judge Barker declined to apply the Indiana rule.[79]

78. *Id.* at 1172.
79. *Id.* at 1172-73.

STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

ROSALIE BERGER LEVINSON*

INTRODUCTION

These materials explore state and federal constitutional law developments over the past year. The first part of this survey examines the growth of the state constitution as an independent source of individual rights. The remaining materials focus on state and federal court cases that raise significant and recurring federal constitutional issues.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

A. Parallel State Provisions Given Independent Significance

Responding to Indiana Supreme Court Chief Justice Randall T. Shepard's invitation to re-examine the state constitution as a potential source for the protection of personal liberty,[1] Indiana practitioners this past year continued to invoke various state provisions; however, they achieved only limited success. Many provisions in Indiana's Bill of Rights parallel those found in the federal constitution, and they were interpreted to provide no greater protection than the federal rights.[2] This was true even where the Indiana Supreme Court held that the state constitutional provision requires a different analysis than its federal counterpart.[3] This year's cases addressed the state guarantee against unreasonable searches and seizures, the Equal Privileges Clause, and the free speech provision.

1. Unreasonable Searches and Seizures.—In *Moran v. State*, the court held that Article I, Section 11, which protects against unreasonable searches and seizures,[4] requires a different analysis than that used under the Fourth Amendment.[5] Indeed, Indiana courts were invoking Section 11 long before the Warren Court developed Fourth Amendment law. Section 11 of the Indiana State Constitution was interpreted to exclude illegally seized evidence thirty-eight years before the Fourth Amendment decision in *Mapp v. Ohio*[6] established this federal

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1. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. *See infra* notes 4-55 and accompanying text.

3. *See infra* notes 4-10 and 23-25 and accompanying text.

4. IND. CONST. art. I, § 11 reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

5. 644 N.E.2d 536, 539-40 (Ind. 1994).

6. 367 U.S. 643 (1961).

principle.[7] It was also used to prohibit bodily intrusions to secure evidence from a defendant some twelve years before the United States Supreme Court reached the same conclusion.[8]

In *Moran*, the defendant argued that Article I, Section 11 should be interpreted to protect against a police officer's warrantless search of curbside trash, even though the United States Supreme Court has held that the Fourth Amendment creates no reasonable expectation of privacy in trash put out for disposal.[9] Rather than examining the victim's reasonable expectations of privacy, the *Moran* court ruled that Section 11 requires the focus be solely on the reasonableness of the officer's conduct.[10] Nonetheless, it concluded that the officer's activity, which did not involve a trespass and which did not create a disturbance, could not be characterized as "unreasonable" under Section 11. Thus, evidence seized from the search of trash containers on the street was admissible: "[W]hile realizing that Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside, we cannot say that the police activity here was unreasonable under Article I, [Section] 11 . . . ."[11]

On the other hand, in *Brown v. State*,[12] the court held that the warrantless search of Brown's vehicle near his home violated Article I, Section 11 because the State did not satisfy "its burden of showing the search was reasonable."[13] Citing to *Moran*, the Court explained that the purpose of this provision was "to protect from unreasonable police activity those areas of life that Hoosiers regard as private."[14] Further, the provision should be liberally construed to protect the people: "The question here is whether, in the totality of these circumstances, reliance by the police upon their own information in deciding to search appellant's car was reasonable."[15] In this case, the police had no search warrant and made no effort to obtain one. Recognizing that "Hoosiers regard their automobiles as private and cannot easily abide their uninvited intrusion . . . ,"[16] the court held the search was unreasonable and thus "the evidence found as a result of . . . [the] search had to be suppressed."[17] However, using Fourth Amendment analysis, the court also held that the warrantless search did not qualify under any of the exceptions recognized under federal law, and would thus be invalid even without

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7. Shepard, *supra* note 1, at 578.

8. *Id.* at 579-80.

9. *See* California v. Greenwood, 486 U.S. 35 (1988).

10. Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994).

11. *Id.* at 541. The court had previously stated that "[i]t has often been said that if you do not want others to know what you drink, don't put empties in the trash." *Id.* Although this statement sounds as though the court is persuaded by expectations of privacy, arguably this is true only to the extent such expectations defeat the reasonableness of the officer's conduct.

12. 653 N.E.2d 77 (Ind. 1995).

13. *Id.* at 79.

14. *Id.* (citing *Moran*, 644 N.E.2d at 540).

15. *Id.* at 79-80.

16. *Id.* at 80 (footnote omitted).

17. *Id.* (citing Callander v. State, 138 N.E. 817 (Ind. 1922)).

the state constitutional guarantee.[18]

Despite the court's "protective" language describing Section 11, its reasoning in one sense renders Section 11 a lesser guarantee than its federal counterpart. Contrary to the analysis under the Fourteenth Amendment that deems a warrantless search per se unreasonable unless the State proves the search falls within a few "'specifically established and well-delineated exceptions . . . ,'"[19] the court ruled that under Section 11 it must conduct a case-by-case assessment as to the reasonableness of the officer's conduct in light of all the circumstances.[20] In a separate concurring opinion, Justice Sullivan expressed his concern that this case-by-case approach will create further uncertainty in the law and that the per se unreasonable rule of the Fourth Amendment should have been followed.[21]

2. *Equal Privileges.*—Another example of the Indiana Supreme Court giving independent significance to a state provision is found in *Collins v. Day.*[22] A suit was brought by a worker who broke his leg while working on a farm but was denied worker's compensation because Indiana law exempts agricultural employers unless they opt in. The court ruled that federal equal protection analysis does not apply to Article I, Section 23, the state "Equal Privileges and Immunities" Clause.[23] Looking to the text of the provision, the expressed purposes and intent of the framers, and early decisions interpreting this Section, the court held that Section 23 requires: (1) that disparate treatment be reasonably related to inherent characteristics which distinguish the unequally treated classes, and (2) that the preferential treatment be uniformly applicable and equally available to all persons similarly situated.[24] The court emphasized, however, that substantial deference must be given to the legislative judgment, which should be invalidated only "where the lines drawn appear arbitrarily or manifestly unreasonable."[25] Using this analysis, the court sustained the state law that excluded agricultural employers from worker's compensation coverage because the plaintiff failed to carry his burden "to negative every reasonable basis for the classification."[26]

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18. *Id.* at 81.

19. *Id.* at 80 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

20. *Id.* at 79-81.

21. *Id.* at 81-82 (Sullivan, J., concurring in judgment only).

22. 644 N.E.2d 72 (Ind. 1994).

23. IND. CONST. art. I, § 23 reads: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

24. *Collins*, 644 N.E.2d at 79. The Court specifically rejected the federal standard, which uses varying degrees of scrutiny depending on the class and interests affected by the classification scheme. *Id.* at 75.

25. *Id.* at 80.

26. *Id.* at 81. The court noted a reasonable basis for the classification might include: "[T]he distinctive nature of farm work, its attendant risks, the typical level of work training and experience, the traditional informality of the agricultural employment relationship, and the peculiar difficulties employers experience in passing along additional costs of worker's compensation insurance to consumers." *Id.*

Thus, while the court rejected the Fourteenth Amendment's analytical framework that applies varying degrees of scrutiny for different protected classes and interests, its independent analysis will not likely afford much greater protection to victims of alleged unfair classification schemes. Recent decisions support this prediction. In *Department of Environmental Management v. Chemical Waste Management, Inc.*,[27] the court, applying *Collins'* two-prong analysis, sustained a classification scheme that treats commercial waste operators differently from non-commercial operators. The Court noted that the purpose of Section 23 was to minimize the risk of misuse of legislative power to benefit certain citizens.[28] Indiana Department of Environmental Management's (IDEM) special statutory requirements imposed only on commercial operators were reasonably related to the differences between the two groups—the profit motive of the commercial operators justified the distinction.[29]

In *Indiana High School Athletic Ass'n v. Avant*,[30] the appellate court sustained an Association transfer rule, whereby students who transfer to member schools with a change of residence by their parents have immediate full varsity eligibility at the new school, while students who transfer without a corresponding move by their parents are ineligible for varsity membership for 365 days following the transfer, unless the student qualifies under a listed exception. The court noted that the distinctions between the classifications were reasonably related to achieving the Association's purpose in deterring school jumping and recruitment and that the rule applied equally to all persons similarly situated.[31]

Similarly, in *Indiana High School Athletic Ass'n v. Reyes*,[32] the court held that

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27. 643 N.E.2d 331 (Ind. 1994).

28. *Id.* at 338.

29. *Id. See also* Person v. State, 661 N.E.2d 587, 593 (Ind. Ct. App. 1996) (holding special statutory classification of minors as persons prohibited from possessing handguns does not violate Section 23 because the class is clearly defined, the classification is reasonably related to the subject matter and purpose of the legislation, and the statutory scheme applies uniformly to all persons under age 18; classifications are primarily a legislative question and become a judicial question only where lines drawn appear arbitrary or manifestly unreasonable); American Legion Post 113 v. State, 656 N.E.2d 1190 (Ind. Ct. App. 1995) (holding statutes that prohibit gambling except for riverboat, pari-mutuel, and state-operated lottery do not violate Section 23; the classification distinguishes among forms of gambling, not individuals, and the preference for the State Lottery Commission is reasonably related to the Commission's distinguishing characteristics).

30. 650 N.E.2d 1164 (Ind. Ct. App. 1995), *trans. denied.*

31. *Id.* at 1170. *Cf.* Indiana High Sch. Athletic Ass'n v. Carlberg, 661 N.E.2d 833 (Ind. Ct. App. 1996) (holding that this same transfer rule violates federal equal protection standards when applied to a student who transfers for reasons unrelated to athletics. The court relied on an earlier state supreme court holding which found the transfer rule "unconstitutionally overbroad." Sturrup v. Mahan, 305 N.E.2d 877 (Ind. 1974). It reasoned that this precedent was binding on Indiana courts even if "out of the mainstream of case law on federal equal protection analysis"—under traditional equal protection scrutiny a rule may not be invalidated due to overbreadth. *Id.* at 834. The court distinguished *Avant* as a case where plaintiff simply did not raise the federal claim).

32. 659 N.E.2d 158 (Ind. Ct. App. 1995).

a rule restricting participation in interscholastic sports to eight semesters met the *Collins* test. It further sustained the "hardship" exception for those who have suffered an injury, illness or accident, finding that the exemption was reasonably related to an inherent characteristic, i.e., lack of opportunity to participate based upon disabling circumstances, and that the rule was uniformly applicable and equally available to all persons similarly situated.[33]

In light of the plaintiff's heavy burden, *Collins* will not revolutionize equal protection law in Indiana. However, because the case calls for a unique analysis under Section 23, it does mandate a new approach to old issues. For example, in *Ledbetter v. Hunter*[34] and *Cundiff v. Daviess County Hospital*,[35] Indiana appellate courts ruled that a provision in Indiana's Medical Malpractice Act barring claims by minors after age eight or two years after the incident had to be remanded for special review under the *Collins* analysis, rather than the equal protection analysis relied on by the trial courts.[36] The plaintiffs in these two cases argued that the Act's disability tolling provision was constitutionally invalid because it distinguishes between minors who bring medical malpractice claims and are thus subject to the Act's short disability tolling period and minors who bring ordinary tort claims, who enjoy the much longer period.[37] Both courts held the cases had to be remanded "for reconsideration in light of the new method of analysis announced in *Collins*," though the *Ledbetter* court cautioned that the burden remains on the plaintiff to "'negative every reasonable basis for the [challenged] classification.'"[38] Because of this highly deferential approach, it is unlikely that many state classification schemes are really in jeopardy.

Perhaps a more fruitful source for challenging arbitrary government classification schemes is Article I, Section 1, which has generally been interpreted as a limitation on abuse of police power. The provision states that Indiana citizens are endowed "with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well-being."[39] In *Chemical Waste*, the court

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33. *Id.* at 169.

34. 652 N.E.2d 543 (Ind. Ct. App. 1995).

35. 656 N.E.2d 298 (Ind. Ct. App. 1995), *trans. denied.*

36. *Ledbetter*, 652 N.E.2d at 550; *Cundiff*, 656 N.E.2d at 302.

37. *Ledbetter*, 652 N.E.2d at 548; *Cundiff*, 656 N.E.2d at 300.

38. *Ledbetter*, 652 N.E.2d at 550 (quoting Collins v. Day, 644 N.E.2d 72, 81 (Ind. 1994)). Note that the Indiana Supreme Court had earlier rejected state and federal equal protection and due process challenges to the Medical Malpractice Act. As to the due process claim, the court stated it was bound by those decisions. It also ruled that the tolling provision did not violate the "open courts" provision of Article I, § 12. *Id.* at 548. However, because these earlier cases proceeded on the premise that Section 23 was coterminous with the Fourteenth Amendment's equal protection analysis, remand was necessary on this issue.

39. IND. CONST. art. I, § 1. This language, taken from the Declaration of Independence, appeared in the first Indiana Constitution of 1816 and was re-enacted in 1850 only after a lengthy debate wherein the framers decided the provision was necessary to incorporate natural law theory

invoked this vague, potentially limitless language to restrict the breadth of a state statute that permitted IDEM to deny a permit application to waste management facilities based on unsubstantiated charges of environmental wrongdoing.[40] In order to avoid violation of Article I, Section 1, the Indiana Supreme Court held that the "good character" section of the statute had to be interpreted as requiring the Commissioner to make concrete findings regarding any alleged environmental wrongdoing and mitigating factors that influenced her decision.[41] Denying a permit based on unsubstantiated charges of wrongdoing would be a potentially arbitrary, unreasonable, and thus an unconstitutional exercise of state police power.[42] Citing earlier case precedent, the Indiana Supreme Court reasoned that Article I, Section 1 mandates that the legislature not "arbitrarily interfere with private business or impose unnecessary restrictions upon lawful occupations."[43]

3. Protection of Political Speech.—One final area where the Indiana Supreme Court has strayed from federal constitutional principles in interpreting a parallel state provision involves free speech rights under Article I, Section 9.[44] Three years ago in *Price v. State*,[45] the court held that political speech is a "core value" embodied in Section 9, and that the state cannot punish political speech even in the context of resisting arrest, unless the political speech inflicted harm upon others "analogous to that which would sustain tort liability against the speaker."[46] Although plaintiff's conduct in shouting profanities protesting the officer's arrest may have created a public nuisance, it did not rise above the level of a "fleeting annoyance" to the residents who were the alleged victims of her tirade, and thus

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into the state constitution. 1 DEBATES IN INDIANA CONVENTION 960, 968 (1850). In Ohio Valley Gas, Inc. v. Blackburn, 445 N.E.2d 1378 (Ind. Ct. App. 1983), the court held that the Section supported "liberty of contract," but only in the sense of guaranteeing freedom from truly arbitrary or unreasonable restraint. In *In re* Lawrance, 579 N.E.2d 32 (Ind. 1991), the Indiana Supreme Court cited to this Section in holding that the state constitution guarantees a right to refuse unwanted treatment, including nutrition and hydration. Citing to the 1850 debates, the court proclaimed the founding fathers' belief that "liberty included the opportunity to manage one's own life except in those areas yielded up to the body politic." *Id.* at 39.

40. Department of Environmental Management v. Chemical Waste Management, Inc., 643 N.E.2d 321, 334 (Ind. 1994). Actually the plaintiffs raised constitutional challenges under four separate provisions. *Id.* This is the only one, however, that succeeded.

41. *Id.* at 341-42.

42. *Id.* at 342.

43. *Id.* at 341.

44. Section 9 provides:

> Right to free thought, speech, writing and printing; abuse of right—No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.

IND. CONST. art. I, § 9.

45. 622 N.E.2d 954 (Ind. 1993).

46. *Id.* at 964.

the state could not punish Price for her words.[47] The case was significant because it meant that even if Price's speech would be deemed unprotected "fighting words" under the First Amendment, her conviction still needed to be overturned because of the state guarantee.[48]

Subsequent cases, however, have clarified that this protection of political speech is far from absolute. In *Price* the forum was a residential alley at 3:00 a.m. after a New Year's Eve party where a large group of "quarreling party-goers" had congregated; in this pandemonium setting, Price's comments could be characterized as a mere fleeting annoyance.[49] In each new context the court must decide when speech becomes sufficiently intrusive of the rights of others so as to constitute an unprotected private, and not merely a public, nuisance. For example, in *Radford v. State*,[50] the court reasoned that Radford's loud complaints to a police officer in a hospital, who had asked her to disclose the contents of a box she was carrying from her place of employment, was not "purely political" speech.[51] Unlike *Price*, the abusive speech invaded the privacy of other patients and destroyed their right to a quiet and peaceful environment.[52] The court cautioned that political speech "not be given an over-expansive definition," and that "'[p]urely political' speech does not include speech directed at a police officer who is attempting to perform his duties or enforce a statute."[53] On the other hand, in *Whittington v. State*,[54] a defendant's conviction for disorderly conduct was reversed because there was no evidence that his speech was "detectable by anyone outside his residence or that it 'intolerably impaired' another person's privacy or use of his land," as required by *Price*.[55]

B. Provisions Unique to the State Constitution

Aside from these cases where Indiana courts construed state constitutional provisions that parallel federal guarantees, there were a few interesting cases involving the interpretation of provisions unique to the state constitution. For example, Article IV, Section 22 prohibits the General Assembly from passing

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47. *Id.*

48. *Id.* at 964-65.

49. *Id.* at 956.

50. 640 N.E.2d 90 (Ind. Ct. App. 1994).

51. *Id.* at 94.

52. *Id.* at 93.

53. *Id.* at 94. Although the context was different in this case, it is hard to reconcile Judge Staton's conclusion that the speech is not political speech because Radford was protesting police action. On the other hand, the context of the speech arguably triggered the private tort exception set forth in *Price*, even though the court did not point to any specific individuals whose privacy interests were being invaded.

54. 634 N.E.2d 526 (Ind. Ct. App. 1994).

55. *Id.* at 527. In his dissent, however, Judge Hoffman argued that other members of Whittington's household were subjected to his tirade, including his pregnant girlfriend. *Id.* at 528.

local or special laws, while Section 23 states that all laws be "general."[56] Further, Section 19 provides that laws must be "confined to one subject and matters properly connected therewith" (germane to each other). In *Indiana Gaming Commission v. Moseley*,[57] the "special laws" provision was invoked to challenge the constitutionality of the Riverboat Gambling Statute that requires a county-wide vote in favor of riverboat gambling for all counties contiguous to bodies of water with less than 400,000 inhabitants (leaving Lake County as the only exempt county in the state) and that requires a separate city-wide vote with regard to counties with less population except for cities with more than 100,000 (leaving Gary as the only exempt city in the state not requiring a separate vote).[58] The court held that because riverboat gambling inherently affects only counties with access to water and because the population restrictions were reasonable, Article IV had not been violated.[59] The framers expressed a preference for general laws, but at the same time recognized that in many situations special laws may be necessary.[60] Therefore, courts must grant a "high degree of deference to the legislature on Section 23 questions."[61]

Similarly, in *Wilson v. Montgomery County Election Board*,[62] the court ruled that a statute allowing county election boards to determine whether a prospective candidate is qualified to hold office is not a special law prohibited by the state constitution. It noted that in determining whether a legislative classification is reasonable every presumption must be indulged in favor of the constitutionality of the statute: "A special law is one made for individual cases, or for less than a class requiring laws appropriate to its particular condition and circumstances, or one relating to particular persons or things of a class."[63] It found the statute was reasonably necessary to accomplish the legislative objective of disqualification based on untrustworthiness.[64] Further, the law applied generally to all potential candidates, it rested upon an inherent and substantial basis of classification, and it operated the same in all parts of the state under the same circumstances and conditions.[65]

Finally, in *Pence v. State*,[66] the court avoided the question of whether a state statute increasing the pay of members of the General Assembly was unconstitutional because the law concerned more than one topic, instead ruling that the challengers lacked standing to bring the action.[67] The Indiana General

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56. IND. CONST. art. IV, §§ 22, 23.
57. 643 N.E.2d 296 (Ind. 1994).
58. *Id.* at 298.
59. *Id.* at 305.
60. *Id.* at 300.
61. *Id.*
62. 642 N.E.2d 258 (Ind. Ct. App. 1994), *trans. denied.*
63. *Id.* at 262.
64. *Id.*
65. *Id.*
66. 652 N.E.2d 486 (Ind. 1995).
67. *Id.* at 488.

Assembly has generally disregarded this "single topic" mandate, but it will be interesting to see whether future constitutional challenges on this ground will be successful.

II. Federal Constitutional Law

A. Procedural Due Process

In deciding whether procedural due process rights are violated, the Supreme Court applies a two-prong analysis. It requires that a plaintiff initially identify a property or liberty interest and, assuming this burden is met, it then balances the competing interests to determine whether sufficient procedural safeguards have been afforded.[68]

1. Identification of Protected Interest.—As to the first part of the analysis, state or local law or custom often dictates whether a property or liberty interest has been created. For example, under Indiana law, most government employees are at-will employees and attempts to find "unwritten common law" or to establish property rights to employment via policy manuals have been generally unsuccessful. In *Wright v. Associated Insurance Companies, Inc.*,[69] the court held that in Indiana an employment relationship is terminable at the will of the employer unless there is a promise of employment for a fixed duration or the employee gives consideration in addition to his services.[70] Similarly, in *Kelly v. Municipal Court of Marion County*,[71] the federal district court noted that in Indiana "[w]ithout a promise of employment for a definite term, policy manuals and handbooks are not a source of procedural guarantees."[72] On the other hand, in *Mid-American Waste Systems, Inc. v. City of Gary*,[73] the Seventh Circuit held that if a contract with a municipality creates rights specific enough to be enforced in state court by damage awards or specific performance, it then creates a legitimate claim of entitlement that is "property" protected by the Due Process Clause.[74] The court rejected the position adopted by other circuits "that only contracts creating a special status (employment, for example) count as 'property.'"[75]

At the United States Supreme Court level, the most significant procedural due

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68. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
69. 29 F.3d 1244 (7th Cir. 1994).
70. *Id.* at 1249-50.
71. 852 F. Supp. 724 (S.D. Ind. 1994).
72. *Id.* at 739.
73. 49 F.3d 286 (7th Cir. 1995).
74. *Id.* at 289.
75. *Id. Cf.* Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 105-09 (Ind. Ct. App. 1995) (holding plaintiff must demonstrate deprivation of a *significant* property interest in order to trigger due process protection; because plaintiffs could not prove any current adverse impact on their property as a result of a contested mechanic's lien, they failed to meet this standard).

process case this Term was *Sandin v. Connor*,[76] holding that an inmate has no liberty interest in remaining free from solitary confinement, despite mandatory language in state prison regulations.[77] Departing from years of case precedent, which established that mandatory language in state prison rules creates a liberty interest on behalf of inmates, the Court reasoned that so long as punishment received is within the range of confinement to be normally expected, inmates are not deprived of a constitutionally protected "liberty interest."[78] The Court opined that the previous analysis created disincentives for states to codify prison management procedures so as to avoid the creation of "liberty interests" and led to the involvement of federal courts in the day-to-day management of prisons.[79] The case means that prisoners can now be sent to disciplinary segregation without being afforded an opportunity to respond to charges leveled against them, and, more broadly, that deprivations of liberty on the part of inmates will be acknowledged only where they impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[80]

2. *What Process Is Due?*.—Once a protected property or liberty interest is identified, the necessary procedural safeguards are determined by balancing: (1) the private interest affected; (2) the risk of erroneous deprivation and the value of additional procedural safeguards; and (3) the government's interests.[81] In *Como, Inc. v. Carson Square, Inc.*,[82] an Indiana appellate court balanced these three factors and found that a tenant was denied due process when he was not provided notice of a foreclosure action, and thus the foreclosure was invalid.[83] On the other hand, in *Haimbaugh Landscaping, Inc. v. Jegen*,[84] the court held that landowners were not denied due process by the state's statutory scheme that allows the filing of a mechanic's lien without a prior hearing or bond.[85] Initially the court contested whether the filing of a lien constitutes a constitutionally significant deprivation of a property interest at all.[86] Even assuming this first hurdle is met, the court

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76. 115 S. Ct. 2293 (1995).

77. *Id.* at 2300.

78. *Id.*

79. *Id.* at 2297-99.

80. *Id.* at 2300. *But see* Thomas v. Newkirk, 905 F. Supp. 580, 584 (N.D. Ind. 1996) (*Sandin* should not be read to "purge due process from the entire gamut of disciplinary segregation cases"; the record was insufficient to establish that three years segregation could be considered an "ordinary incident of incarceration.").

81. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

82. 648 N.E.2d 1247 (Ind. Ct. App. 1995).

83. *Id.* at 1249.

84. 653 N.E.2d 95 (Ind. Ct. App. 1995).

85. *Id.* at 110.

86. *Id.* at 107-09. *See also* Pro-Eco v. Board of Comm'rs, 57 F.3d 505, 513 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 672 (1995) (noting that although the Due Process Clause protects a wider range of interests as property than does the takings clause, and thus an option to purchase real property may be construed as property, the County Board of Commissioners' promulgation of a moratorium following a public hearing where plaintiff's representative was present and could

ultimately decided that the very purpose of the lien statute, which is to protect workers who provide labor and materials for improvement of real property, would be defeated if a contested court hearing or bond was required *before* the notice of lien took effect.[87] The mechanic lienor's "pre-existing" or "heightened" interest in the landowner's property was used to distinguish this law from attachment statutes that the courts have invalidated for not providing pre-deprivation process:

> Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property owner who has defaulted on his promise to pay . . . .[88]

Thus, the court concluded that the mechanic's lien statute provided sufficient "process" to protect the competing property interests at issue.

In *Jones v. City of Gary*[89] the Seventh Circuit similarly denied the plaintiff's claim of entitlement to pre-deprivation process. Jones, a municipal firefighter, asserted that he was terminated without being provided a hearing. Although noting that normally post-suspension hearings for terminated employees are inadequate, the court weighed the competing factors and held that the City's interests in maintaining a full complement of firefighters for the benefit of the entire community outweighed the individual's interest in his continued employment.[90] The firefighter claimed the discharge was invalid because a medical problem prevented him from appearing at work, but the record showed that his medical condition had already been subjected to three independent administrative evaluations, and thus there was a low risk of error.[91] The court emphasized that it was not generally endorsing an absolute elimination of pre-suspension hearings for firefighters, but rather, it was holding that with regard to this particular firefighter the post-suspension hearing would sufficiently protect his property interest.[92]

The need for pre-deprivation process was also rejected in *Mid-American Waste Systems, Inc. v. City of Gary*.[93] The court held that a lessee disputing the substance of the city's action in canceling a lease did not have a right to a prior administrative hearing. The opportunity for the lessee to litigate in state court the city's alleged breach of the lease for operation of the landfill satisfied the Due

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address the provision, does not violate due process rights; this is so even though the Board allegedly did not follow the state statute providing for notice of public hearings and input from the Advisory Plan Commission when it promulgated the contested zoning ordinance).

87. *Haimbaugh Landscaping*, 653 N.E.2d at 110.

88. *Id.* (citing Connecticut v. Doehr, 501 U.S. 1, 27-28 (1991) (Rehnquist, C.J., concurring)).

89. 57 F.3d 1435 (7th Cir. 1995).

90. *Id.* at 1442.

91. *Id.* at 1443.

92. *Id.* at 1444.

93. 49 F.3d 286 (7th Cir. 1995).

Process Clause.[94] Essentially the Seventh Circuit reasoned that Mid-American's claim sounded more like a substantive rather than a procedural due process claim and, to the extent that it was procedural, *Mathews* did not require an evidentiary hearing prior to adverse administrative action when dealing with commercial contracts: "[L]itigation after the fact provides an ample opportunity to test the validity of the City's interpretation and supply a remedy if the City has erred."[95]

B. Substantive Due Process

As suggested in *Mid-American Waste*, the Supreme Court has recognized that the Due Process Clause contains a substantive component that bars arbitrary, wrongful government conduct.[96] However, the Court has been very reluctant to find a substantive due process violation, and a highly deferential standard is normally used. One of the most hotly contested substantive due process issues facing the lower federal courts, as well as the Supreme Court, is whether due process imposes a limitation on the jury's power to impose punitive damages. Although the Supreme Court has held that such a limitation can be read into substantive due process, the Justices have failed to agree on an appropriate standard. In *TXO Production Corp. v. Alliance Resources Corp.*,[97] the Court sustained a punitive damage award 525 times greater than the compensatory damage award, making it unlikely that substantive due process challenges will be successful. As Justice Scalia commented, "[T]he great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than TXO.'"[98]

While Justice Scalia argues that substantive due process can never be used to restrict punitive damage awards, some Justices maintain that it may be invoked where an award is grossly excessive or disproportionate to the compensatory award.[99] Other Justices say size is irrelevant—the sole inquiry is whether the award is impermissibly motivated—a verdict of passion, not of reason.[100]

This Term the Supreme Court may provide guidance as to when punitive damage awards will be struck as unconstitutional. It has agreed to decide whether

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94. *Id.* at 291. *See also* Clifft v. Indiana Dept. of Revenue, 660 N.E.2d 310 (Ind. 1995) (holding that procedures afforded by controlled substance excise tax, which permits Department of State Revenue to immediately seize property after assessment, does not violate procedural due process because it grants review in a meaningful time and manner in an area where the magnitude of the government's need to take action without administrative delay justifies the temporary deprivation of property); Mitchell v. State, 659 N.E.2d 112 (Ind. 1995) (holding that suspension of driver's license after lawful conviction for possession of cocaine and full sentencing hearing does not violate procedural due process).

95. *Id.* at 292.

96. *Id.* at 291.

97. 113 S. Ct. 2711 (1993).

98. *Id.* at 2727 (Scalia, J., concurring).

99. *Id.* at 2718-20. (Stevens, J., joined by Chief Justice Rehnquist and Justice Blackmun).

100. *Id.* at 2724-26. (Kennedy, J., concurring).

a $2 million punitive damages verdict, which is 500 times the compensatory damages awarded, is grossly excessive in violation of the due process clause. In *BMW of North America v. Gore*,[101] a jury awarded $4 million in punitive damages against a car distributor who failed to disclose to dealers and customers that it had repainted the "new" cars because of acid rain damage during transit.[102] The state supreme court cut the award in half because it was based on the distributor's conduct in other states, and neither the judge nor the jury had evidence showing in which states such conduct was unlawful.[103] The distributor contends the remitted award is still grossly excessive and thus unconstitutional. Oral argument was heard in October 1995.

Following the Supreme Court's lead, lower courts have also shown their reluctance to find substantive due process violations. For example, in *Mid-American Waste*, the Seventh Circuit held that substantive due process should play no role in business law (other than under a "takings" analysis) and that even when used to protect personal liberty, "substantive due process is limited to the domain of fundamental rights."[104] Because depositing garbage in landfills is not a fundamental right, and corporations like Mid-American do not have liberty interests, much less fundamental rights, no substantive due process violation could be claimed.[105]

In *Pro-Eco v. Board of Commissioners*,[106] the court, citing *Mid-American Waste*, reasoned that a corporation challenging a county moratorium on the construction and operation of landfills could not plead violation of fundamental rights.[107] The corporation claimed it had invested capital and labor in excess of $220,000 to obtain an option to purchase real estate and that the county, upon learning of its intended development, enacted this moratorium prohibiting the development of sanitary landfills within the county, contrary to the owner's substantive due process rights.[108] The court rejected the broad assertion in *Mid-American Waste* that "substantive due process is limited to the domain of fundamental rights." It recognized that even absent a fundamental right an ordinance may be struck if it is "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." However, it proceeded to find that the Board had a legitimate concern that construction of a landfill would create serious, permanent, and irreversible environmental damage,

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101. 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995).

102. *Id.* at 621-22.

103. *Id.* at 628-29.

104. Mid-American Waste Systems, Inc. v. City of Gary, 49 F.3d 286, 291 (7th Cir. 1995).

105. *Id. See also* National Paint & Coatings Ass'n v. Chicago, 45 F.3d 1124 (7th Cir. 1995) (holding city ordinance prohibiting sale of spray paint and jumbo indelible markers does not violate store owners' substantive due process rights because corporations do not have fundamental rights, or liberty interests.).

106. 57 F.3d 505 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 672 (1995).

107. *Id.* at 514.

108. The facts are set forth in the earlier decision on this case found at 956 F.2d 635 (7th Cir. 1992) (*"Pro-Eco I"*).

endangering the welfare of citizens of Jay County, Indiana, which defeated the substantive due process claim.[109] The court emphasized that government action survives the rational basis test imposed under the substantive due process clause provided a sound reason may be hypothesized; government is not required to prove the reason to a court's satisfaction.[110]

Finally, in *Hines v. Caston School Corp.*,[111] a school policy that forbids male students from wearing earrings withstood substantive due process analysis. Although assuming that students possess a constitutional right to freedom in matters of personal appearance under the Due Process Clause,[112] the state appellate court ruled that the school may interfere with this "liberty" interest by merely demonstrating a rational basis for its policy.[113] The court reasoned that the policy was rationally related to the school's legitimate educational objective to improve student's attitudes toward school, which in turn improves attendance, drop-out rates, and academic performance.[114] Further objectives were instilling discipline and creating a positive educational environment by means of a reasonable and consistently applied dress code.[115] The policy also reflects the conservative local community standards and serves to prevent disrespect for authority and discipline within the school.[116] The court held that it was sufficient under the Due Process Clause for the school to show a rational relationship between its rule and a valid educational objective.

C. Equal Protection

The school policy in *Hines* was also challenged on equal protection grounds

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109. *Pro-Eco*, 57 F.3d at 514 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

110. *Id.* at 514 (citing Northside Sanitary Landfill, Inc. v. City of Indianapolis, 902 F.2d 521, 522 (7th Cir. 1990)).

111. 651 N.E.2d 330 (Ind. Ct. App. 1995), *trans. denied.*

112. *Id.* at 332.

113. *Id.* at 335.

114. *Id.* Note that the court rejected, as unsupported by the record, the school's allegation that the ban was needed to prevent gang influence or to discourage homosexuality. *Id.*

115. *Id. See also* Mitchell v. State, 659 N.E.2d 112 (Ind. 1995) (Because there is no fundamental right to drive, state statute that requires sentencing court to revoke driver's license of persons convicted of certain crimes need only bear a rational relationship to a legitimate state interest; the state's interest in punishing and deterring law breakers, even if there is no nexus between the use of the vehicle and the underlying criminal conduct, satisfies this test.). *Cf.* Clark v. Donahue, 885 F. Supp. 1159 (S.D. Ind. 1995). The court rejected the defendant's claim that patients who are voluntarily admitted to a state mental institution have no substantive due process rights to be protected from mistreatment. The court reasoned that depending on the patient's specific condition, "institutionalization which originated voluntarily may at some point involve restraint of personal liberty sufficient to trigger the protections of the due process clause." *Id.* at 1162. The court denied defendants' motion for summary judgment because fact issues existed as to whether there was a special relationship between the patients and the hospital. *Id.* at 1162-64.

116. *Hines*, 651 N.E.2d at 335.

because girls, unlike boys, were allowed to wear earrings.[117] The Supreme Court has held that in cases involving gender discrimination, the state has the burden of demonstrating that the discrimination bears a fair and substantial relation to an important government interest (intermediate scrutiny).[118] The Indiana court summarily rejected the equal protection claim without really subjecting it to intermediate scrutiny, reasoning simply that, "[t]he dress code prohibits all students from wearing jewelry inconsistent with community standards, without respect to gender."[119] As with the due process claim, the court reiterated that the wearing of earrings by males is inconsistent with community standards of dress, and because enforcement of community standards to instill discipline is a legitimate educational function, the equal protection challenge failed.[120]

In *Scariano v. Justices of Supreme Court of Indiana*,[121] the Seventh Circuit rejected an equal protection challenge to Indiana's requirement that attorneys licensed to practice law in states other than Indiana demonstrate for a period of five years that their practice in Indiana exceeds or is equal to their practice in another jurisdiction in order to have the bar exam waived.[122] The court found that Rule 6 of the Indiana Rules for Admission to the Bar was rationally related to the state's interest in protecting consumers and the legal community from non-Indiana attorneys who are not familiar with the state's laws and bar requirements.[123]

The most significant United States Supreme Court decisions involving equal protection arose in the context of affirmative action. In *Miller v. Johnson*,[124] the Court held that where race is a predominant factor in a congressional districting plan, the government must meet strict scrutiny even if it is allegedly seeking to comply with Justice Department orders imposed under the Voting Rights Act.[125] The Court reasoned that although the state has a significant interest in eradicating the effects of past racial discrimination, and that compliance with the Voting Rights Act could provide a compelling interest to justify such discrimination, the Justice Department's interpretation of the Voting Rights Act to impose a "black-maximization" policy went far beyond Congress' intent to ensure that voting procedure changes do not lead to retrogression in the position of racial minorities.[126] In December the Court heard two more cases addressing the question of whether congressional districts, bizarrely configured to facilitate the

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117. *Id.*

118. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1425 (1994).

119. *Hines*, 651 N.E.2d at 336.

120. *Id.*

121. 38 F.3d 920 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2582 (1995).

122. *Id.* at 922.

123. *Id.* at 924. Rule 6 also survived a commerce clause challenge that this was a protective measure which unduly burdened interstate commerce. The court reasoned that any effect on interstate commerce was minimal, especially because a bar exam is imposed on the vast majority of Indiana attorneys as well. *Id.* at 928.

124. 115 S. Ct. 2475 (1995).

125. *Id.* at 2481.

126. *Id.* at 2491.

election of minority representatives, are narrowly tailored to achieve the state's compelling interest in complying with the Voting Rights Act.[127]

In a second significant opinion, the Court made it more difficult to justify giving minorities preferences in the awarding of federal contracts, holding that congressionally enacted race-based set aside programs must meet strict scrutiny. The Supreme Court in *Adarand Constructors, Inc. v. Pena*,[128] overruled earlier case precedent requiring that federal affirmative action programs meet only intermediate scrutiny (fair and substantial relation to an important government interest)[129] as opposed to strict scrutiny, which requires that the means be narrowly tailored to accomplish a compelling government interest. Because the lower court had tested the validity of the set aside program for awarding highway construction contracts under intermediate scrutiny, the case had to be remanded.[130]

Writing for the majority, Justice O'Connor emphasized, however, that strict scrutiny should not be viewed as "strict in theory but fatal in fact."[131] She noted that government is not disqualified from acting in response to the persistence of lingering effects of past race discrimination, provided the means are narrowly tailored.[132] Strict scrutiny, she argued, ensures that all government race-based decisions are carefully examined to determine which are objectionable, and it eliminates the perception of inferiority that arises when Congress does not clearly articulate the need and basis for its race classification.[133] Some of the Justices took the position that making up for past discrimination *never* justifies racial classifications.[134] However, because this was a 5-4 ruling, Justice O'Connor's somewhat more temperate approach has, at least temporarily, prevailed.[135]

D. Free Speech and Association

A significant number of United States Supreme Court, as well as lower state and federal court, decisions addressed important First Amendment issues. Commercial speech cases, as well as cases involving the free speech rights of government employees, have generated the most litigation. In addition, this Term the United States Supreme Court tackled difficult questions involving the right not to speak and the validity of content-based restrictions on speech.

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127. *See* Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994); Bush v. Vera, 861 F. Supp. 1304 (S.D. Tex. 1994), *cert. granted*, 115 S. Ct. 2639 (1995) (argued Dec. 5, 1995).

128. 115 S. Ct. 2097 (1995).

129. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990).

130. *Adarand*, 115 S. Ct. at 2118.

131. *Id.* at 2117.

132. *Id.*

133. *Id.*

134. *Id.* at 2118 (Scalia, J., concurring).

135. In another significant affirmative action case, the Court let stand a Fourth Circuit decision invalidating a University of Maryland program that gave scholarships exclusively to black students. Podberesky v. Kirwan, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

1. Right Not to Speak.—In *Hurley v. Irish-American Gay Group of Boston*,[136] the Court was asked to resolve a conflict between the state's interest in prohibiting discrimination in places of public accommodations and the general rule of speaker autonomy protected by the First Amendment. Since 1947, the Veteran's Council, a private sponsor, had been in charge of organizing a St. Patrick's Day parade in Boston.[137] Although the Veteran's Council rarely rejected a group or an organization seeking to participate, in 1992 it refused to allow the Gay, Lesbian and Bi-Sexual Group of Boston (GLIB) to march.[138] Relying upon the state public accommodations statute that prohibits discrimination based on sexual orientation, a state court ordered the Council to allow GLIB to participate in the parade.[139]

The Supreme Court reversed, in a unanimous opinion, finding that parades are expressive speech protected by the First Amendment and that the organizers' autonomy to shape the parade's message is a critical part of the protection afforded by the First Amendment.[140] This right to exclude others was not forfeited by the Council's failure to isolate a specific message as the exclusive subject of the parade or because the Council had been rather lenient in accepting participants in the past.[141] The public accommodations statute had the effect of forcing the Veteran's Council to alter the parade's expressive content, thus violating the fundamental First Amendment rule that speakers have autonomy to choose the content of their own message and, further, to decide what not to say.[142]

The Court emphasized that the Council's decision was not due to the sexual orientation of GLIB's members, but rather was related to GLIB's message.[143] Indeed, the marchers stated that they wished to participate to express pride in their Irish heritage "as openly gay, lesbian and bi-sexual individuals" and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day parade.[144] Because the Council's decision was related to GLIB's message and not to the sexual orientation of GLIB's members, this request to participate in the parade came into direct conflict with the First Amendment principle that government cannot force speakers to advocate the views of others.

2. Commercial Speech.—Since 1976, the Supreme Court has recognized that commercial speech falls within the umbrella of the First Amendment, although it has never afforded commercial speech the full protection of non-commercial speech.[145] Because commercial speech is protected only to the extent it conveys

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136. 115 S. Ct. 2338 (1995).

137. *Id.* at 2341.

138. *Id.*

139. *Id.* at 2341-42.

140. *Id.* at 2340.

141. *Id.* at 2345.

142. *Id.* at 2347. "One important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* (citation omitted).

143. *Id.*

144. *Id.* at 2346.

145. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

truthful information to consumers, the state may ban such speech if it is false, deceptive, or misleading, or if it concerns unlawful activity. Further, in *Central Hudson Gas & Electric v. Public Service Commission*,[146] the Court held that even truthful, non-misleading commercial speech may be subject to state regulation, provided the law directly and materially advances a substantial interest in a manner no more extensive than necessary to serve that interest.[147] Although the standard is certainly not a toothless one, it is well-recognized that the government has somewhat greater leeway in regulating commercial as opposed to non-commercial speech.

This past Term, the Supreme Court addressed two cases involving commercial speech. In *Rubin v. Coors Brewing Co.*,[148] the Court unanimously held that provisions in the 1935 Federal Alcohol Administration Act that prohibited beer labels from displaying alcohol content were unconstitutional restraints on free speech, which failed to meet the *Central Hudson* test. Although the Court accepted the government's argument that its interest in preventing "strength wars" between brewers was "substantial" enough to satisfy the first prong of the test, the statute did not directly advance the government interest and it was more extensive than necessary to serve that interest.[149]

Justice Thomas pointed to the "overall irrationality" of the government's regulatory scheme that required display of alcohol content on the labels of wine and spirits and even allowed alcohol content disclosure in beer advertising in states that do not prohibit such advertisements.[150] The regulations also permitted brewers to signal high alcohol content through the use of the descriptive term "malt liquors."[151] Thus, there was little chance that the federal law directly and materially advanced its aim, and in fact some provisions of the statute directly undermined and counteracted the purported goals.[152] In October, the Supreme Court heard argument on whether Rhode Island may prohibit truthful, non-misleading price advertising of alcoholic beverages except at the point of sale.[153]

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146. 447 U.S. 557 (1980).

147. *Id.* at 566.

148. 115 S. Ct. 1585 (1995).

149. *Id.* at 1592-93. It is significant that the Court rejected the so-called "vice exception" that legislatures be given greater latitude to regulate speech that promotes harmful activities. Instead the Court applied the analysis from *Central Hudson*, finding that the 1935 statute did not pass that test. *Id.* at 1589 n.2. *Cf.* L.E. Services v. State Lottery Comm'n, 646 N.E.2d 334 (Ind. Ct. App. 1995) (holding that Indiana's interest in regulating gambling activities far outweighs the commercial interests of companies who are required by state law to obtain approval from the Lottery Commission prior to using the word "lottery" in its corporate name).

150. *Rubin*, 115 S. Ct. at 1592. Justice Thomas comments that, the "irrationality of this puzzling regulatory framework ensures the ban will fail to achieve its goal." *Id.*

151. *Id.* at 1593.

152. *Id.*

153. 44 Liquor Mart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1995), *cert. granted*, 115 S. Ct. 1821 (1995) (argued Oct. 31, 1995).

The second commercial speech case, *Florida Bar v. Went For It, Inc.*,[154] involved the validity of a Florida ethics rule requiring lawyers and lawyer-referral services to wait thirty days before sending targeted direct mail solicitation letters to victims of accidents or disasters.[155] The Supreme Court has addressed attorney advertising in several previous cases, holding in favor of the attorney in all cases except those involving in-person solicitation and misleading omissions from advertisements.[156] For example, in *Ibanez v. Florida Department of Business & Professional Regulation*,[157] the Court ruled that an attorney who advertised herself as a certified public account (CPA) and a certified financial planner (CFP) could not be reprimanded for engaging in false, deceptive and misleading advertising.[158] Further, in 1988, the Supreme Court held that state ethics rules barring direct mail solicitation could not withstand First Amendment scrutiny.[159]

In contrast, the Court in *Florida Bar v. Went For It, Inc.* sustained a thirty-day ban prohibiting lawyers from soliciting business from victims or their families until thirty days after a death or injury.[160] In a 5-4 ruling, the majority recognized that the state had substantial interests both in protecting the privacy of injured persons and their relatives and in shielding them from overreaching at a time of great emotional and physical vulnerability, and in protecting the "flagging reputation" of lawyers.[161] The holding was based in large part on a two-year study of lawyer advertising and solicitation conducted by the Florida Bar. A 106-page summary of the study was presented to the Court, which provided both statistical and anecdotal evidence confirming the fact that the public's perception of lawyers was significantly harmed by this type of targeted direct mail solicitation.[162] Thus, the Court found that the rule directly and materially advanced these interests. Further, the ban was narrowly tailored in that it was limited to only thirty days immediately after injury or death, and it provided lawyers ample alternative channels of communication through radio and television advertising, yellow page advertising, newspapers, etc.[163]

Although the dissent argued that this proscription denied prompt legal representation that is essential at a time when insurance adjusters and opposing

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154. 115 S. Ct. 2371 (1995).

155. *Id.* at 2374.

156. *Id.* at 2375 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) and Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1988)).

157. 114 S. Ct. 2084 (1994).

158. *Cf. In re* Anonymous, 630 N.E.2d 212 (Ind. 1994). The court upheld a disclaimer/disclosure requirement mandating that the words "advertising material" be conspicuously displayed on every written or recorded communication to prospective clients. The Indiana Supreme Court ruled that First Amendment rights were not violated because the state has a substantial interest in regulating abuses and minimizing mistakes.

159. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

160. *Florida Bar*, 115 S. Ct. at 2381.

161. *Id.* at 2376.

162. *Id.* at 2377.

163. *Id.* at 2380.

counsel have access to families,[164] the majority stated that there was no evidence in the record demonstrating such harms.[165] Some states, encouraged by the Court's recent holding, are considering the adoption of similar rules.[166] Indiana does not currently have such a rule. However, several states, including Nevada, New Jersey, California, Texas, New Mexico, and Iowa have similar and even more restrictive bans.

3. Free Speech Rights of Government Employees.—The United States Supreme Court has held that the government cannot condition employment upon relinquishing First Amendment rights.[167] However, it has also held that "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."[168] To reconcile these competing principles, the Court has balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs . . . ."[169]

While most cases involve individual speakers and the government's response to specific speech, in *United States v. National Treasury Employees Union*,[170] the Court was asked to determine whether Congress can impose a wholesale ban on the speech of federal employees. The 1989 Ethics Reform Act prohibits payment for appearances, speeches, or articles by government employees, regardless of whether the speech is in any way connected to the government employment.[171] The law is based on the purported need to prevent the actual or apparent impropriety in the abuse of honoraria.[172] The Court ruled that the ban significantly and impermissibly burdened the speech of the plaintiff class, which consisted of executive branch employees all below grade 16 of the General Schedule (GS-16).

Although a stronger presumption of validity normally attaches to a congressional judgment, the Court felt that the widespread impact of the honoraria ban and the chilling effect it had on expression gave "rise to far more serious

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164. *Id.* at 2381 (Kennedy, J., dissenting).

165. *Id.*

166. Richard C. Reuben, *Florida Bar's Ad Restriction is Constitutional*, A.B.A. J., Aug. 1995, at 20.

167. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967). The most significant application of this doctrine has been in the area of political patronage where the Court has ruled that employment decisions cannot be based upon political affiliation. This Term the Supreme Court has agreed to decide whether this First Amendment protection extends to independent contractors where government terminates its business with a company solely because the contractor exercised his constitutionally protected right of political belief and association. Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995), *cert granted sub nom.* Heiser v. Umbehr, 115 S. Ct. 2639 (1995); O'Hare Truck Service, Inc. v. City of Northlake, 47 F.3d 883 (7th Cir. 1995), *cert. granted*, 116 S. Ct. 593 (1995).

168. United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1012 (1995).

169. *Id.* (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

170. 115 S. Ct. 1003 (1995).

171. *Id.* at 1009-10.

172. *Id.* at 1009.

concerns than could any single supervisory decision."[173] The broad prohibition on compensation induced employees to curtail their expression, and it imposed a significant burden on the public's right to read and hear what the employees would otherwise have written and said.[174] Recognizing the government's strong interest in ensuring that federal employees not misuse or appear to misuse power by accepting compensation for their non-official and non-political writing and speaking activities, the Court nonetheless found that the government cited no concrete evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16.[175]

Further, the vast patchwork of exceptions in the statute cast doubt on the government's argument that the rule was necessary to promote the efficiency of the federal service. For example, the statute exempted a series of appearances, speeches, or articles provided such were unrelated to the individual's status with the government, whereas individual articles or speeches were taboo, even if neither the subject matter nor the payor bore any relationship to the author's duties.[176] In addition, the Office of Government Ethics, the agency that enforced the ban with respect to the executive branch employees, defined "appearances" to exclude artistic or athletic performances; it defined "speech" to exclude delivering sermons or reading parts in plays; and it defined "articles" to exclude works of fiction, poetry, lyrics or scripts.[177]

In short, the ban applied to some 1.7 million employees whose jobs were far removed from government policymaking or decisionmaking and whose speech activities rarely bore any relationship to their specific duties.[178] The breadth of the ban and the unexplainable exceptions belied the asserted importance of the government's interest in enforcing the ban. Although the government asked the Court to invalidate the ban only with regard to speech having no nexus to the government, the Court held that any redrafting should be left to Congress.[179] It did, however, limit its holding to the parties before it, namely only executive branch employees below grade GS-16.[180]

As the Supreme Court explained in *National Treasury*, where an individual employee's speech is at issue, the Court applies a balancing test to determine whether the employee's speech rights outweigh the government's interest.[181] In *Connick v. Myers*,[182] the Court somewhat refined this test by demanding that an

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173. *Id.* at 1014.

174. *Id.* at 1012-15.

175. *Id.* at 1016.

176. *Id.*

177. *Id.* at 1016-18.

178. *Id.* at 1022 (O'Connor, J., concurring). Among the plaintiffs were a postal worker who gave lectures on the Quaker religion for a small payment and an aerospace engineer who had lectured on black history for a fee of $100 per lecture. *Id.* at 1010.

179. *Id.* at 1019.

180. *Id.* at 1018-19.

181. *Id.* at 1012.

182. 461 U.S. 138 (1983).

initial inquiry be made as to whether the government employee's speech is a matter of public concern, because "private" speech is entitled to little, if any, First Amendment protection. The Court provided little guidance as to how to resolve this initial question, but it has directed the lower courts to examine the form, content, and context of the speech.[183] Applying this "test," the Seventh Circuit in *Cliff v. Board of School Commissioners*,[184] held that a public school teacher's comments regarding class size and student discipline, which were made in response to an adverse evaluation challenging the teacher's ability to control her classroom, were not of public concern, and thus disciplinary action taken for those comments did not violate the First Amendment.[185]

Even if the speech is of public concern, it will not necessarily survive the "balance" test. In *Bird v. County of Allen*,[186] the Indiana appellate court ruled that statements by a police officer accusing another officer of a "bad shooting" and the department of a cover-up of the incident were not constitutionally protected. The court reasoned that even if the subject matter of the speech involved a matter of public concern, these statements were false and malicious, they threatened to undermine authority in the department, and they made the department doubt the officer's future effectiveness and credibility as a policeman.[187] In short, the disruptiveness of the speech outweighed its value under the First Amendment.

On the other hand, where an employee's speech involves misuse of public funds or possible corruption in government, the government will be required "to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished."[188] Thus, in *West v. Phillips*,[189] the district court held that the plaintiff's speech about the alleged or possible corruption of a legislator could not be penalized because the defendants failed to make a showing that the disruptiveness of the speech, in terms of adverse effect on worker productivity or jeopardy to confidentiality of legitimate legislative activity, outweighed the employee's First Amendment rights.[190]

4. Content-Based Restrictions on Speech.—It is well recognized that the central purpose of the First Amendment is to prevent government from punishing speech on the basis of its content. Therefore, if government is seeking to suppress a particular message or a particular speaker, a strict scrutiny standard must be met—the regulation must be necessary to serve a compelling interest and it must

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183. *Id.* at 147.

184. 42 F.3d 403 (7th Cir. 1995).

185. *Id.* at 410.

186. 639 N.E.2d 320 (Ind. Ct. App. 1994).

187. *Id.* at 327. *See also* Board of Trustees v. Landry, 638 N.E.2d 1261 (Ind. Ct. App. 1994) (holding that teacher's First Amendment right of academic freedom was not violated by imposing two-day suspension without pay for his act of removing glossaries from science textbooks issued to students, because the school corporation's interest in demanding compliance with criminal laws proscribing destruction of school property far outweighed any alleged symbolic speech rights).

188. Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994).

189. 883 F. Supp. 308 (S.D. Ind. 1994).

190. *Id.* at 319.

be no more restrictive than necessary.[191] This principle was brought home in two Supreme Court decisions last Term.

In *McIntyre v. Ohio Elections Commission*,[192] the Court addressed the validity of an Ohio statute that banned distribution of anonymous campaign literature designed to influence an election or defeat a candidate. All states, except for California, have similar statutes that bar distribution of unsigned documents designed to influence voters in elections.[193] Margaret McIntyre was fined $100 for distributing flyers opposing the passage of a school tax levy without including her name and address.[194] Ohio argued that disclosure increases accountability and presumably the accuracy of political discourse.[195] The Court nonetheless held that the "identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."[196] Because this statute seeks to regulate "core political speech," the Court found the statute could not survive "exacting scrutiny."[197]

Although conceding that the state may have compelling interests in preventing fraudulent and libelous statements that may mislead the electorate, the Court reasoned that the government interest was already served by an Ohio statute prohibiting the making or dissemination of false statements during political campaigns.[198] The flat ban on all anonymous electoral literature was too broad, encompassing documents that are not even arguably false or misleading. The Court emphasized that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."[199]

Actually, in 1960 the Supreme Court invalidated an ordinance requiring that names and addresses of persons who prepare literature be revealed prior to public distribution.[200] However, in that case the government action was aimed at political and racial minorities and civil rights organizations,[201] thus leaving open the question of whether a ban on anonymous leafleting would be permissible if the state's true interest in the ban was identifying those persons whose literature might

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191. United States v. Eichman, 496 U.S. 310 (1990). *See also* Chicago Police Dept. v. Mosley, 408 U.S. 92, 95 (1972). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

192. 115 S. Ct. 1511 (1995).

193. *Id.* at 1530-31.

194. *Id.* at 1514.

195. *Id.* at 1519.

196. *Id.* "People are intelligent enough to evaluate the source of an anonymous writing. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message." *Id.* at n.11 (citations omitted).

197. *Id.*

198. *Id.* at 1520-21.

199. *Id.* at 1524.

200. Talley v. California, 362 U.S. 60, 64 (1960).

201. *Id.* at 64.

be fraudulent, misleading, or libelous.[202] The Ohio Supreme Court reasoned that a balancing approach, rather than strict scrutiny, was appropriate because the case involved election law and the critical need to ensure the integrity of the electoral process, and the statute was viewpoint neutral in that it applied to all speakers and did not depend on what position the speaker took on a particular issue.[203] Despite the special subject matter of the regulation and the viewpoint neutrality, the Supreme Court rejected the balancing approach used by Ohio because there was direct compulsion of speech of a specific content, and it held that the law could not survive strict scrutiny analysis.[204] The Court's decision overturns the ban against anonymous campaign literature found in forty-nine states, requiring them to draft statutes more specifically directed at preserving the integrity of the electoral process.

A second case demonstrating the Court's adherence to the neutrality principle was *Rosenberger v. Rector & Visitors of University of Virginia.*[205] The University of Virginia distributes Student Activity Funds (SAF), derived from mandatory student fees, to support various activities related to the educational purpose of the University, but it excludes from SAF support religious activities, as well as political and philanthropic activities.[206] Based on this proscription, the University refused to fund *Wide Awake*, a magazine whose purpose was to present a Christian perspective to the University's faculty and students.[207] *Rosenberger* was more complicated than *McIntyre* because it involved the well-recognized principle that although government cannot suppress speech, it need not *fund* the exercise of our First Amendment rights.[208] Nonetheless, where the government creates an open forum, having decided to subsidize the private speech of various groups, the Court has held that government cannot deny funding based on the viewpoint of the speaker.[209]

Wide Awake was one of fifteen student publications at the university. SAF funding was made available to the fourteen other groups, including the Muslim Student Association, which published articles on Islamic doctrine, and the "The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire."[210] The University argued that it was not discriminating against any viewpoint, but rather was merely choosing not to allocate scarce funds to support a particular subject matter, namely religion.[211] Refusing to draw such fine lines,

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202. *McIntyre*, 115 S. Ct. at 1517. Further, *Talley* did not involve election law where the need to protect the fundamental right to vote is implicated, and thus greater restrictions on speech have been allowed. Burson v. Freeman, 504 U.S. 191 (1992).

203. *McIntyre*, 115 S. Ct. at 1518-19.

204. *Id.* at 1513.

205. 115 S. Ct. 2510 (1995).

206. *Id.* at 2514.

207. *Id.* at 2515.

208. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545-46 (1983).

209. *Rosenberger*, 115 S. Ct. at 2517-19.

210. *Id.* at 2527. (O'Connor, J., concurring).

211. *Id.* at 2517.

the Court held that "the University may not silence the expression of selected viewpoints," and it cannot rely upon scarcity of public money to justify otherwise impermissible viewpoint discrimination among private speakers.[212] However, because a compelling interest may justify viewpoint discrimination, the Court went on to address the University's defense that providing this funding would violate the Establishment Clause. This issue is discussed in the next section.

E. Freedom of Religion

1. Aid to Religious Institutions.—Because the Supreme Court in *Rosenberger* held that the University of Virginia's denial of student activity funds for *Wide Awake* was impermissible "viewpoint discrimination,"[213] it follows that the University's policy was subject to strict scrutiny, i.e., it would have to demonstrate a compelling interest for refusing to finance the group's publication. The University argued that avoiding violations of the Establishment Clause provides the compelling government interest needed to justify its position.[214]

The Supreme Court has long interpreted the Establishment Clause as a mandate that the government maintain a position of neutrality vis-a-vis religion. In *Lemon v. Kurtzman*,[215] the Supreme Court held that the Establishment Clause requires non-violative government programs to share three characteristics: (1) the program must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the government program cannot create excessive entanglement between church and state.[216] However, at least five of the current sitting Justices have strongly criticized *Lemon* and urged adoption of a more "accommodationist" approach to church-state questions.[217] Some Justices have argued that the Establishment Clause is violated where the government has endorsed or demonstrated affirmative approval of religion,[218] while others contend that the Establishment Clause bars only discrimination by government among religious organizations or coercive pressure by government to engage in religious activities.[219]

More directly on point, recent rulings have held that when religious organizations receive support through general programs of public assistance, designed to advance non-religious goals and not targeted at religious organizations alone, the Establishment Clause is not violated. For example, in *Zobrest v. Catalina Foothills School District*,[220] the Court upheld the provision of a sign

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212. *Id.* at 2519.

213. *Id.* at 2516-20.

214. *Id.* at 2520-21.

215. 403 U.S. 602 (1971).

216. *Id.* at 612-13.

217. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-98 (1993) (Scalia, J., concurring).

218. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

219. *See* Lee v. Weisman, 505 U.S. 577, 638-45 (1992) (Scalia, J., dissenting).

220. 113 S. Ct. 2462 (1993).

language translator for a deaf student attending Catholic school even though the state-paid translator would make incidental religious statements in some translations. The Court reasoned that so long as the program has a wide scope and religious activities are only a small portion of the overall government program (intended primarily to assist handicapped children), government cannot be found to have endorsed religion as such.[221]

Relying on the *Zobrest* precedent, a majority of the *Rosenberger* Court, without citing *Lemon* directly, held that because the object of the SAF program was not in any way to aid religion and the student fee was not a general tax designed to raise revenues for the University, the case did not present "the special Establishment Clause dangers" that arise "where the government makes direct money payments to sectarian institutions."[222] Justice Kennedy emphasized that the government was not willfully fostering or encouraging any mistaken impression that the newspapers spoke for the University and in fact it had taken pains to disassociate itself from the private speech: "there is no real likelihood that the speech in question is being either endorsed or coerced by the state."[223] Further, Justice Kennedy emphasized that because the group was given access to University facilities, it could have prepared the paper at the University's computer facility, and it made no sense to find an Establishment Clause violation simply because the University was asked to pay a third party contractor for the printing costs.[224] In short, "[a]ny benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis."[225]

Although Justice Thomas' concurring opinion contends that the Establishment Clause should never be read to compel exclusion of religious groups from government benefit programs that are generally available to a broad class of participants,[226] Justice O'Connor's concurrence gives the opinion a more limited scope, while providing the fifth vote necessary to secure a decision finding no violation of the Establishment Clause.[227] Justice O'Connor, author and staunch supporter of the endorsement test, emphasized that this is not a situation where the University could be deemed to be endorsing the magazine's religious perspective for several reasons: (1) the student organizations remain strictly independent of the University; (2) the financial assistance is distributed in a manner that ensures its use only for permissible purposes because funds are paid directly to the third-party printer and do not pass through the organization's coffers; (3) the assistance is provided in a context that makes improbable any perception of government endorsement in light of the wide array of non-religious, anti-religious, and competing religious viewpoints supported by the University; and (4) SAF does not represent government resources derived from tax revenues, sales or other

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221. *Id.* at 2467.
222. Rosenberger v. Rector & Visitors of Univ. of Virginia, 115 S. Ct. 2510, 2523 (1995).
223. *Id.*
224. *Id.* at 2523-24.
225. *Id.* at 2524.
226. *Id.* at 2532-33 (Thomas, J., concurring).
227. *Id.* at 2525-28 (O'Connor, J., concurring).

assets, but rather a fund that belongs to and is administered by students.[228] Thus, she cautions that the majority opinion should not be broadly read to signal the demise of the direct funding prohibition in Establishment Clause jurisprudence.[229]

Four dissenters lamented the significance of the Court's opinion: "The Court today for the first time, approves direct funding of core religious activities by an arm of the State."[230] Justice Souter distinguished early cases, such as *Zobrest*, as involving *indirect* aid, which reached religious institutions only as a result of private choices of aid recipients.[231] He emphasized "the patently and frankly evangelistic character of the magazine," and argued that evenhandedness in distributing benefits does not overcome the constitutional ban on *direct* funding of religion.[232]

Because earlier case precedent suggested that direct monetary grants to a pervasively religious institution are impermissible, *Rosenberger* appears to signal a change in the Court's approach. However, *Rosenberger* did not overrule *Lemon*, but instead focused on the case precedent involving general programs.[233] This suggests that rather than adopting a single test in the Establishment Clause area, the Court may provide separate tests depending upon the type of issue involved.[234] Further, although a majority sustained a direct monetary grant, Justice O'Connor's fifth vote limited the approval of such grants to circumstances where a program survives her endorsement test.[235] Her opinion emphasized the special features of the SAF program, i.e., the independence of the student organizations from the University, the flow of money to third party vendors and not the organization, the funding to fifteen other magazines, some of which presented an anti-religious perspective, and the fact that the funds came from student fees rather than proceeds from general assessments[236]—thus leaving uncertain how the Court will rule in a direct monetary grant case with a different fact scenario.

2. Government Display of Religious Symbols.—As in *Rosenberger*, the Court in *Capitol Square Review & Advisory Board v. Pinette*,[237] undertook the task of resolving a conflict between free speech and Establishment Clause principles. The Ku Klux Klan sought permission to erect a large Latin cross in the Capitol Square, the site of Ohio's capitol building which houses the executive and legislative

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228. *Id.* at 2526-28.

229. *Id.* at 2528. ("The Court's decision today neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence.").

230. *Id.* at 2533. (Souter, J., dissenting, joined by Justices Stevens, Ginsburg and Breyer).

231. *Id.* at 2541-42.

232. *Id.* at 2540-41.

233. *Id.* at 2523-25.

234. Justice O'Connor specifically recognizes that the Establishment Clause "cannot easily be reduced to a single test." *Id.* at 2528.

235. *Id.* at 2526.

236. *Id.* at 2526-27.

237. 115 S. Ct. 2440 (1995).

branches of government.[238] Despite the fact that a state-sponsored Christmas tree and a privately-sponsored Menorah were displayed on Capitol Square, the state agency refused permission to the Klan based on its belief that the display would violate the Establishment Clause.[239] The Court concluded that Capitol Square was a traditional public forum, and, while recognizing that avoiding an Establishment Clause violation would provide a sufficiently compelling interest to justify this content-based restriction on speech, the Court, as in *Rosenberger*, rejected the Establishment Clause defense.

The Court's opinion in *Capitol Square* was even more divided than in *Rosenberger*. A four-Justice plurality urged adoption of a per se rule that religious expression can never violate the Establishment Clause where it is purely private and occurs in a traditional or designated public forum.[240] Only where the expression is that of the government itself or the government is discriminating in favor of private religious expression or activity, does a constitutional problem arise. The fact that the private speech is conducted close to symbols of government was simply irrelevant.[241] The plurality argued that in cases where the government is administering a neutral program, the endorsement test is inapplicable: "Private religious speech cannot be subject to veto by those who see favoritism where there is none."[242]

Three concurring Justices, led by Justice O'Connor, argued that the endorsement test should be used even where a neutral state policy toward private religious speech in a public forum is involved: "Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, . . . the Establishment Clause is violated."[243] The three concurring Justices found, however, that in this case the reasonable observer would not fairly interpret the state's tolerance of the Klan's religious display as an endorsement of religion in light of the lengthy history of use of the Square as a public place where a multiplicity of secular and religious viewpoints have been presented.[244] Justice O'Connor fine-tuned her endorsement test somewhat by explaining, that "the reasonable observer [should] be deemed more informed than the casual passerby" and should be held to knowledge of the history of the community, including in this case the fact that Capitol Square is a public park that has been used over time by numerous private speakers.[245] Joining Justice O'Connor, Justice Souter emphasized that the flat denial was unnecessary in light of other options, such as a disclaimer, legible from a distance, that could explain that the cross was erected

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238. *Id.* at 2445.
239. *Id.*
240. *Id.* at 2440.
241. *Id.* at 2447-50.
242. *Id.* at 2449.
243. *Id.* at 2454. (O'Connor, J., concurring).
244. *Id.* at 2457.
245. *Id.* at 2455.

by private individuals without government support.[246]

The two dissenters, Justices Stevens and Ginsburg, applied the same endorsement test, but concluded that the reasonable observer would not know the difference between public and non-public forums nor the history of Capitol Square.[247] They would adopt a general rule that the Constitution forbids placement of a symbol of a religious character in, on, or before the seat of government: "The very fact that a sign is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of the government itself."[248] Further, they note that the display caused precisely the type of religious strife that the Establishment Clause was intended to prevent—the Klan sought permission in response to a display of a Menorah and the battle prompted vandalism and motivated other sects to seek permission to place their symbols on the Square.[249]

Because of the highly fractured decision, the future of government display of religious symbols remains somewhat uncertain. Justice Scalia's view, which would broadly allow privately sponsored displays of religious symbols in public forums, reflects only a plurality. Because the three concurring Justices and the two dissenters utilized the endorsement test, this analysis would appear to govern. However, the endorsement test will now look to the reasonable observer with knowledge of the history and context of the display—described by Justice Stevens in dissent as the "ultra-reasonable observer."[250] More significantly, the concurring Justices emphasized that the flat ban was impermissible because a disclaimer could avoid the Establishment Clause problem.[251] Because the use of a disclaimer figured so largely in the concurring opinion, it may mean that the use of disclaimers in future cases will be viewed as essential to avoid Establishment Clause problems—certainly a prominently displayed disclaimer will go far in putting the "ultra-reasonable" observer on notice that the Establishment Clause is not being violated!

Of central importance to the Court's reasoning in *Capitol Square* was its finding that Capitol Square was a public forum. In contrast, in *Grossbaum v. Indianapolis-Marion County Building Authority*,[252] the parties stipulated that the City-County Building's lobby in Indianapolis was a non-public forum.[253] Where government does not open up its property indiscriminately to the public for First Amendment purposes, the Supreme Court has held that "discrimination based on subject matter was permissible, but discrimination on the basis of viewpoint was

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246. *Id.* at 2461-62 (Souter, J., concurring).
247. *Id.* at 2465-75.
248. *Id.* at 2467.
249. *Id.* at 2471.
250. *Id.* at 2469.
251. *Id.* at 2461-62.
252. 63 F.3d 581 (7th Cir. 1995).
253. *Id.* at 583.

not."[254] The district court held that the ban on holiday religious displays was not forbidden viewpoint discrimination, but rather "the Building Authority had decided to avoid the controversy that might be provoked by displays of religious symbols."[255] The Seventh Circuit reversed this ruling, finding that exclusion of religious speech is impermissible viewpoint discrimination.[256] Invoking the analysis in *Rosenberger*, the court concluded that the Lubavitch, who were seeking to display a Menorah in the lobby, were excluded because of the religious perspective of their "speech," and that this was unconstitutional under the First Amendment's Free Speech Clause.[257] Because others with non-religious messages remained free to apply for space in the City-County Building and to display non-religious holiday messages, it could not then exclude access for private holiday displays expressing a religious viewpoint.

The Building Authority also argued that its exclusion of the Menorah display was justified because such a display "in the seat of government conveys the appearance of governmental endorsement of religion in violation of the Establishment Clause."[258] Invoking the recent *Capitol Square* decision, the Seventh Circuit found that "opening of government property for religious speech does not confer any imprimatur of state approval on religious sects or practices."[259] Although recognizing that this case involved a nonpublic rather than a public forum as in *Capitol Square*, the court cited earlier Supreme Court precedent holding that "an even-handed, neutral right of access is just as important in evaluating non public or limited forums as it is in evaluating public forums."[260] Thus, placement of the Menorah in the lobby of the City-County Building did not raise significant Establishment Clause concerns that would outweigh the plaintiff's right to free expression.

3. Prayer in Public Schools.—Since the 1960's, the Supreme Court has closely adhered to the principle that prayer in public schools is prohibited by the Establishment Clause. This is the rule whether students deliver the prayer or whether the prayer ceremony is voluntary.[261] Further, in *Lee v. Weisman*,[262] the Court, in a 5-4 decision, held that the Establishment Clause outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation

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254. *Id.* (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)).

255. *Id.* at 584.

256. *Id.* at 587-90.

257. *Id.* at 591-92.

258. *Id.* at 592.

259. *Id.* at 594.

260. *Id.* at 595. The government subsequently amended its regulation to ban *all* displays from the building, and this action was sustained as a content-neutral provision and not a retaliatory measure. Grossbaum v. Indianapolis-Marion County Bldg. Auth., 909 F. Supp. 1187 (S.D. Ind. 1996).

261. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

262. 505 U.S. 577 (1992).

ceremonies. Justice Kennedy found that graduation prayers "bore the imprint of the state and thus put school-age children who objected in an untenable position."[263] He emphasized the heightened concern with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary school setting.[264] The question of whether these same concerns apply in a university setting was addressed by a federal district court in Indiana last summer.

In *Tanford v. Brand*,[265] Indiana University argued that it could include an invocation and benediction in its commencement ceremonies without violating the Establishment Clause. Suit was brought by an Indiana University Law School professor and some of his students seeking a preliminary injunction against inclusion of the prayers.[266] The district court ruled that college students do not require the same protection from coercion that bars comparable prayers at the elementary and secondary school levels. The plaintiffs here were "mature adults" who "are trained to analyze arguments skeptically and not to be subtly coerced by pressure, peer or otherwise."[267] Further, because of the size and impersonal content of the ceremony, there was neither the same pressure to attend, nor the coercion that was so critical to the decision in *Lee*.[268]

Although the court acknowledged the Supreme Court's recent criticism of the *Lemon* test, because the decision has not been overruled, it felt duty bound to apply it.[269] Solemnizing the occasion and continuing a 155-year old University tradition satisfied the secular purpose test.[270] Second, in light of the non-sectarian and brief nature of the invocation and benediction, as well as the sophistication of the audience in the University setting, the court did not see the prayer as advancing or endorsing religion.[271] Finally, it saw little entanglement because the University's involvement was limited to inviting the clergy persons and giving general suggestions that the invocation and benediction be uplifting.[272] Because the degree of entanglement was "relatively minor" when compared with other Establishment Clause cases, the court determined overall that the plaintiffs were unlikely to succeed on the merits, and thus were not entitled to preliminary

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263. *Id.* at 590.

264. *Id.* at 592-96.

265. 883 F. Supp. 1231 (S.D. Ind. 1995).

266. *Id.* at 1234-35.

267. *Id.* at 1240. In addition, Judge Barker expressed some concern as to the sincerity of the claim, noting that in light of "the identities of the plaintiffs, we have our doubts about whether this suit represents anything more than a clinical classroom exercise contrived by a law professor and two of his students." *Id.* at 1237 n.3. This gratuitous remark is unfortunate because academic/law background should not be grounds for questioning the sincerity or genuineness of the plaintiffs' interest in bringing their claims.

268. *Id.* at 1239-42.

269. *Id.* at 1242-43.

270. *Id.* at 1244.

271. *Id.* at 1245.

272. *Id.* at 1245-46.

injunctive relief.[273]

CONCLUSION

Although this past year the Indiana Supreme Court handed down key decisions establishing a new analysis for claims brought under the state "unreasonable search and seizure" and "equal privileges" clauses, it is unlikely that the state constitutional provisions will guarantee any greater protection for individual liberty than their federal counterparts.[274] Further, Indiana's unique constitutional provisions prohibiting "special" laws will be read against a strong presumption of validity; courts generally must defer to the state legislature.[275]

As to federal constitutional law, it appears that Indiana employees continue to enjoy only limited due process rights because state law generally has failed to provide them with a protected property interest in their jobs.[276] Further, prisoners in Indiana, as elsewhere, have a much more restricted basis for launching a federal due process challenge to prison conditions, even where such conditions violate state prison regulations.[277] Substantive due process claims fared no better. One Seventh Circuit decision would cut off entirely the availability of such claims in the business domain, while other decisions generally emphasize the importance of deferring to legislative authority.[278]

Decisions from the United States Supreme Court reflect this same conservative approach. The Supreme Court clarified that strict scrutiny analysis will be used to test all remedial classification programs, including districting plans allegedly adopted to comply with the Voting Rights Act, as well as congressionally enacted race-based set aside programs.[279] Perhaps the one exception to this conservative trend was the series of Supreme Court decisions regarding First Amendment guarantees. The Court issued significant rulings addressing the right not to speak, the right to engage in commercial speech, the right to speak anonymously, and the right to receive private remuneration as well as non-discriminatory government funding for one's speech.[280] Where free speech rights clashed with Establishment Clause claims the Court found in favor of protecting First Amendment freedoms, finding no Establishment Clause violations where government provided its property or funding for religious speakers.[281]

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273. *Id.* at 1246.
274. *See supra* notes 4-38 and accompanying text.
275. *See supra* notes 57-65 and accompanying text.
276. *See supra* notes 69-75 and accompanying text.
277. *See supra* notes 76-80 and accompanying text.
278. *See supra* notes 104-110 and accompanying text.
279. *See supra* notes 124-135 and accompanying text.
280. *See supra* notes 136-212 and accompanying text.
281. *See supra* notes 222-251 and accompanying text.

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This Article highlights the significant changes effected by the Indiana General Assembly and appellate courts in 1995 in the area of criminal law and procedure.

I. 1995 LEGISLATIVE ACTS

A. New Offenses

In response to confusion surrounding whether the pointing of an unloaded handgun constitutes Criminal Recklessness,[1] the General Assembly created the offense of "Pointing firearm at another person."[2] The new crime makes it illegal to "knowingly or intentionally point[] a firearm at another person." This is a class D felony; "[h]owever, the offense is a class A misdemeanor if the firearm was not loaded."[3] The section is not applicable to a law enforcement officer acting within the scope of his official duties "or to a person justified in using reasonable force to protect life or property."[4]

The General Assembly created a new offense entitled "Overpass mischief."[5] This crime, a class C felony, makes it illegal for a person on an overpass to drop, cause to drop, or throw an object that causes bodily injury to another person.[6] Further, it is a criminal offense for a person to place an object on an overpass which falls off the overpass and causes bodily injury to another person.[7] In this latter instance, the person must have intended for the object to fall off the overpass.[8] The offense is enhanced to a class B felony if it results in serious bodily injury to another person.[9] "Overpass" is broadly defined as "a bridge or other structure designed to carry vehicular or pedestrian traffic over any roadway, railroad track, or waterway."[10]

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1. IND. CODE § 35-42-2-2 (Supp. 1995).
2. *Id.* § 35-47-4-3.
3. *Id.* § 35-47-4-3(b).
4. *Id.* § 35-47-4-3(a).
5. *Id.* § 35-42-2-5.
6. *Id.* § 35-42-2-5(b)(1).
7. *Id.* § 35-42-2-5(b)(2).
8. *Id.*
9. *Id.* § 35-42-2-5(b).
10. *Id.* § 35-42-2-5(a).

"Battery by body waste," a new statute, makes it a class D felony for a person to place, in a rude, insolent, or angry manner, blood or another bodily fluid or waste on a law enforcement officer or a corrections officer while such officer is engaged in the performance of official duties.[11] This statute also makes it a crime for a person to coerce another person into doing the same.[12] The offense is enhanced to a class C felony if the person knew, or recklessly failed to know, that he was infected with hepatitis B, HIV, or tuberculosis, and a class B felony if commission of the offense transfers hepatitis B or tuberculosis to the other person.[13] The offense is a class A felony if that person knew or recklessly failed to know that he or she was infected with HIV and transmits HIV to the victim.[14]

It is now a class B felony for a person eighteen years of age or older to commit battery resulting in serious bodily injury to a person under fourteen years of age.[15] In addition, a person who violates a protective order that results in bodily injury to the petitioner is now subject to a five-day nonsuspendible term of imprisonment.[16] The court, which retains discretion to order the manner in which the term of imprisonment is served, must order at least forty-eight hours of consecutive imprisonment and the entire sentence must be served within six months of the order.[17] Credit time is not awarded while serving the five-day sentence.[18]

The General Assembly also broadened the scope of the offense of "Dealing in Cocaine or a narcotic drug."[19] It is now a class A felony to deliver, or finance the delivery of, cocaine in, on, or within 1,000 feet of a public park.[20] Public park is defined as "any property operated by a political subdivision for park purposes."[21]

It is now an offense to possess or use a code grabbing device to disarm a security alarm system or automatic door locking system of a motor vehicle in furtherance of committing a crime.[22] This offense is a class C misdemeanor.[23]

The General Assembly created a new offense this session entitled "Vending machine vandalism."[24]

A person who knowingly or intentionally damages a vending machine or

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11. *Id.* § 35-42-2-6(c).
12. *Id.*
13. *Id.* § 35-42-2-6(c)(1), (2).
14. *Id.* § 35-42-2-6(c)(3).
15. *Id.* § 35-42-2-1(4).
16. *Id.* § 35-46-1-15.1(b).
17. *Id.* § 35-46-1-15.1(b)(1)-(2).
18. *Id.* § 35-46-1-15.1(c).
19. *Id.* § 35-48-4-1.
20. *Id.* § 35-48-4-1(b)(3).
21. *Id.* § 35-41-1-23.7.
22. *Id.* § 33-45-12-2.
23. *Id.*
24. *Id.* § 35-43-4-7.

> removes goods, wares, merchandise, or other property from a vending machine without inserting or depositing a coin, bill, or token made for that purpose, or without the consent of the owner or operator of the vending machine commits a class B misdemeanor.[25]

Further, "the offense is a class A misdemeanor if the amount of damage or the value of the goods, wares, merchandise or other property removed from the vending machine is at least $250.00."[26]

The General Assembly also created a new crime of theft. The chapter, entitled "Conversion or Misappropriation of Title Insurance Escrow Funds," declares it a class D felony "to knowingly or intentionally convert[] or misappropriate[] money received or held in a title insurance escrow account; or receive or conspire to receive such money . . . ."[27] Under the statute the actor must be "an officer, a director, or an individual associated with the title insurer as an employee of an insured, independent contractor, or a title insurance agent . . . ."[28] The offense is enhanced to a class C felony if the amount of money converted, misappropriated, or received falls between $10,000 and $100,000.[29] However, if the amount is equal to or exceeds $100,000, the offense is a class B felony.[30] When a person is convicted of an offense under this chapter, "[t]he court shall direct the clerk of court to notify the Indiana department of insurance."[31] The chapter also provides for the payment of restitution to the victim.[32]

B. Sex Offenses

The General Assembly amended the sex offender registry by redefining an offender as a person convicted of a sex offense after June 30, 1994.[33] The statute was further amended to specify "that an offender's duty to register terminates ten (10) years after the date the offender is released from prison, placed on parole, or placed on probation, whichever occurs last."[34] The General Assembly also added the offense of sexual misconduct with a minor as a class A or B felony[35] and possession of child pornography[36] to the list of offenses for which an offender must register.

The penalty of voyeurism was enhanced this session from a class B misdemeanor to a class D felony when a camera, video camera or any other type

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25. *Id.* § 35-43-4-7(b).
26. *Id.*
27. *Id.* § 35-43-9-7(a).
28. *Id.*
29. *Id.* § 35-43-9-7(b)(1).
30. *Id.* § 35-42-9-7(b)(2).
31. *Id.* § 35-43-9-8.
32. *Id.* § 35-43-9-9.
33. *Id.* § 5-2-12-4.
34. *Id.* § 5-2-12-5(b).
35. *Id.* § 5-2-12-4.
36. *Id.* § 5-2-5-5.

of video recording device is used, without the consent of the victim, during the commission of the offense.[37] A second or subsequent offender of public indecency under Indiana Code section 35-45-4-1(a) is now required to serve thirty days of nonsuspendible jail time.[38]

The General Assembly broadened the scope of the child pornography and child exploitation statute by raising, from less than sixteen to less than eighteen years of age, the age of a child depicted or described.[39] Possession of child pornography is now a class D felony.[40] The knowing or intentional possession of any sexual representation of someone less then sixteen years of age or who appears to be less than sixteen years of age is a class A misdemeanor offense.[41]

C. Sentencing

The General Assembly once again amended the sentencing statutes for murder and class A felonies. A person who commits murder shall be imprisoned for a fixed term of fifty-five years,[42] a five-year increase from the 1994 legislation. As before, each sentence can be increased or decreased by not more than ten years for aggravating or mitigating circumstances.[43] Similarly, a person who commits a class A felony shall now be imprisoned for a fixed term of thirty years.[44] Twenty years may still be added and not more than ten years subtracted for aggravating and mitigating circumstances.[45]

In a bold attempt to punish those who commit drug offenses while possessing or using a firearm, the General Assembly enacted legislation that enhances the sentence received when a person commits a drug offense and the State separately proves, beyond a reasonable doubt, that the person knowingly or intentionally used or unlawfully possessed a handgun, sawed-off shotgun, or machine gun while committing the offense.[46] If the State sustains its burden, "the court may sentence the person to an additional term of imprisonment of not more than five years."[47] However, if the firearm used or unlawfully possessed is a sawed-off shotgun, the court may then sentence the person to an additional term of imprisonment of not more than ten years.[48] If the firearm used or unlawfully possessed is a machine gun or is equipped with a firearm silencer or firearm muffler, the court may enhance the person's term of imprisonment for a fixed term of up to twenty

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37. *Id.* § 35-45-4-5.
38. *Id.* § 35-50-3-1.
39. *Id.* § 35-42-4-4(b)(1)-(2).
40. *Id.* § 35-42-4-4(b).
41. *Id.* § 35-42-4-4(c).
42. *Id.* § 35-50-2-3(a).
43. *Id.*
44. *Id.* § 35-50-2-4.
45. *Id.*
46. *Id.* § 35-50-2-13 (a).
47. *Id.* § 35-50-2-13(b).
48. *Id.* § 35-50-2-13(b)(1).

years.[49] This new statute applies only to offenses committed after June 30, 1995.

To lessen the confusion surrounding what is an "episode of criminal conduct" for the purpose of limiting the term of imprisonment imposed as consecutive sentences,[50] the General Assembly defined "episode of criminal conduct" as "offenses or a connected series of offenses that are closely related in time, place, and circumstance."[51] Further, the General Assembly provided a list of offenses that are "crimes of violence," and thus exempt from the sentencing limitation for consecutive sentences.[52] The offenses include: murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, aggravated battery, kidnapping, rape, criminal deviate conduct, child molesting, robbery as a class A or B felony, or burglary as a class A or B felony.[53]

The habitual offender sentencing statute was amended to delete the section that mandated the imposition of a term of life imprisonment if the person was convicted of committing three violent felonies.[54] This section, which had been added by 1994 legislation, was in effect less than one year.

Death penalty legislation was substantially amended this session. Effective July 1, 1995, the death penalty is to be imposed by means of lethal injection.[55] A court that sentences a defendant to death must now fix the date of execution not later than one year and one day after the date of conviction.[56] The Indiana Supreme Court has exclusive jurisdiction to stay the execution of a death sentence.[57] If such occurs, the Supreme Court must establish a new date for the execution.[58] If a petition for post-conviction relief is filed in a death penalty case, and the court concludes that the petition has some merit, the court must set a hearing date within ninety days after the petition is filed.[59] If the court fails to set a hearing date, that failure cannot be a basis for relief.[60] The attorney general is now required to answer the petition on behalf of the State.[61] The prosecuting attorney shall assist the attorney general if so requested. Finally, the post-conviction court is required to enter written findings of fact and conclusions of law within ninety days of the conclusion of the hearing.[62]

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49. *Id.* § 35-50-2-13(b)(2).

50. *See infra* notes 190-198 and accompanying text for a discussion of the manner in which Indiana's appellate courts have interpreted the phrase "episode of criminal conduct" in the old version of the consecutive sentencing statute.

51. IND. CODE § 35-50-1-2(b) (Supp. 1995).

52. *Id.* § 35-50-1-2(a).

53. *Id.*

54. IND. CODE § 35-50-2-8(f) (1993) (repealed 1995).

55. IND. CODE § 35-38-6-1(a) (Supp. 1995).

56. *Id.* § 35-50-2-9(h).

57. *Id.*

58. *Id.*

59. *Id.* § 35-50-2-9(i).

60. *Id.*

61. *Id.*

62. *Id.*

II. CASE DEVELOPMENTS IN 1995

A. Community Corrections Programs

In 1995, the Indiana Court of Appeals clarified what steps the State must take under the requirements of the Due Process Clause to revoke a defendant's placement in a community corrections program. In doing so, the court relied heavily on prior Indiana decisions construing Indiana's probation statutes. In *Million v. State*,[63] Million pled guilty to nonsupport of a dependent and was sentenced by the trial court to a community corrections program on work release as an alternative to incarceration.[64] The trial court ordered Million to serve this sentence consecutively with a work release program he was already sentenced to as the result of another conviction.[65] Approximately one week before he completed his work release from the other conviction, the director of the community corrections program discovered that Million had violated the terms of his community corrections placement.[66]

The community corrections director, in a document entitled "Administrative Hearing," recommended that Million be committed to the Indiana Department of Correction for the nonsupport of a dependent conviction.[67] The trial court accepted the director's recommendation and revoked Million's community corrections placement without a hearing, then conducted a judicial review of the director's administrative determination and affirmed the revocation.[68]

The court of appeals reversed the revocation of Million's placement in the community corrections program and remanded the case to the trial court for a plenary hearing on the revocation.[69] The court made three significant holdings. First, the court held a defendant must receive notice of the terms of his placement in a community corrections program prior to placement in the program, even though the community corrections program statute[70] did not expressly provide that notice was required.[71] The court determined that because Million was orally advised of the terms of his placement at sentencing, he received adequate notice.[72] Second, the court, relying on *Ashba v. State*,[73] a case construing the probation

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63. 646 N.E.2d 998 (Ind. Ct. App. 1995).
64. *Id.* at 999.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1003.
70. IND. CODE § 35-38-2.6-1 (Supp. 1995).
71. *Million*, 646 N.E.2d at 1000.
72. *Id.* at 1000-01.
73. 570 N.E.2d 937 (Ind. Ct. App. 1991), *aff'd*, 580 N.E.2d 244 (Ind. 1991), *cert. denied*, 503 U.S. 1007 (1992). The court in *Ashba* held that a trial court may revoke a defendant's probation before the defendant commences the portion of a suspended sentence during which he

revocation statute, held that trial courts may revoke a defendant's placement in a community corrections program even before the defendant enters the community corrections phase of the sentence.[74] The trial court thus held that the revocation of Million's placement was not improper when he was still serving his work release from his other conviction at the time he violated the terms of his placement.[75]

Most importantly, the court, relying on *Isaac v. State*,[76] another probation revocation case, held that in order for the trial court to comply with the requirements of due process, it must provide certain procedural safeguards before revoking a defendant's placement in a community corrections program.[77] The court of appeals, reiterating the Indiana Supreme Court's sentiments in *Isaac*, stated that the trial court must provide a defendant with the following: (1) written notice of the claimed violation; (2) disclosure of the evidence against the defendant; (3) an opportunity to be heard and present evidence; and (4) the right to confront and cross-examine adverse witnesses in a neutral hearing before the trial court.[78] The court held that because Million had not been afforded these safeguards, his right to due process of law was violated and he was entitled to a plenary hearing on the revocation of his placement.[79]

B. Evidence

1. Breath Testing Results.—The Indiana Court of Appeals handed down two important decisions relating to the admissibility of breath-test results from "breathalyzer" machines. In the first of the two cases, *Storrjohann v. State*,[80] the defendants, all of whom were charged with driving while intoxicated and with operating a vehicle with at least ten-hundredths percent by weight of alcohol in the blood, appealed the trial court's denial of their motions to suppress their breath test results. The defendants argued that their breath test results were inadmissible because the Department of Toxicology of the Indiana University School of Medicine, as required by statute,[81] failed to establish selection criteria for the

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or she is placed on probation. *Id.* at 939-40.

74. *Million*, 646 N.E.2d at 1000-02. The court noted that the trial court's authority to revoke a community corrections placement prior to the commencement of the defendant's community corrections phase was "inherent in the trial court's discretion both to order placement in a community corrections program and then revoke the placement upon a violation of its terms." *Id.* at 1002.

75. *Id.* at 1002.

76. 605 N.E.2d 144 (Ind. 1992), *cert. denied*, 508 U.S. 922 (1993). *Isaac* set forth the steps that the State must take under the Due Process Clause to revoke a defendant's probation.

77. *Million*, 646 N.E.2d at 1002-03.

78. *Id.* at 1003.

79. *Id.*

80. 651 N.E.2d 294 (Ind. Ct. App. 1995).

81. IND. CODE § 9-30-6-5(a) (Supp. 1995).

breath-testing equipment used to test them.[82]

The court rejected the defendants' argument. The court first noted that existing regulations in the Indiana Administrative Code[83] already provided some selection standards,[84] though these standards were not specifically designated as "selection criteria."[85] Second, the court noted that breath-test results are only inadmissible when some aspect of the test, including the testing equipment itself, is not approved by the Department of Toxicology.[86] Because there was no dispute that the testing equipment the police used to test the defendants was approved by the Department, the court found no basis to suppress the evidence.[87] Finally, the court stated that because the Department had adopted an approved method for the use of the machine used to test the defendants, the machine implicitly met the selection criteria the Department had specified.[88]

The companion case to *Storrjohann* was *Key v. State*.[89] Key, who was convicted of the same offenses as the defendants in *Storrjohann*, challenged his conviction on the same basis as the defendants in *Storrjohann*—that the results of his breath test were inadmissible because the Department had not promulgated standards for the selection of breath-testing equipment.[90] The *Key* court utilized virtually the same analysis that the court in *Storrjohann* had employed. However, unlike the defendants in *Storrjohann*, Key argued that the Department's subsequent adoption of a new administrative rule specifically setting forth selection criteria for breath-testing equipment supported his contention that the Department had not previously adopted selection criteria.[91] The court rejected Key's contention, finding that the new rule was merely a clarification and was not required by statute.[92]

2. Child Sexual Abuse Accommodation Syndrome.—The Indiana Supreme Court handed down a significant opinion regarding the use of expert testimony in

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82. *Storrjohann*, 651 N.E.2d at 295.

83. IND. ADMIN. CODE tit. 260, r.1.1-2-1, r.1.1-2.1 (1992).

84. These standards included: (1) the breath-testing equipment had to be capable of using a specific type of solution to simulate an actual breath test, (2) the machine's test results could not deviate from a specific range of results, and (3) the machine had to yield a result up to a third decimal. *Storrjohann*, 651 N.E.2d at 296.

85. *Id.*

86. *Id.* (citing IND. CODE § 9-30-6-5(d) (Supp. 1995); Mullins v. State, 646 N.E.2d 40, 49 (Ind. 1995)).

87. *Id.*

88. *Id.* at 296-97.

89. 651 N.E.2d 1190 (Ind. Ct. App. 1995).

90. *Id.* at 1191. The *Key* court considered Key's claim to be an issue of first impression because in *Storrjohann*, the two concurring judges concurred in result only. Therefore, the court in *Key* noted that "there was no majority opinion [in *Storrjohann*]. The opinion of a single judge is not an opinion of the Court of Appeals." *Id.* at 1191 & n.1.

91. *Id.* at 1191.

92. *Id.* at 1192.

child molestation cases in *Steward v. State*.[93] Steward was convicted of two counts of child molesting after the State presented evidence through two expert witnesses with experience in dealing with child sexual abuse victims. Both witnesses testified that child sexual abuse victims exhibit common behavioral patterns, more commonly referred to as Child Sexual Abuse Accommodation Syndrome (CSAAS). The witnesses also testified that one of the victims in Steward's case exhibited such behavior.[94] On appeal, Steward argued that this testimony was not scientifically reliable evidence and, therefore, was inadmissible.[95]

The court granted transfer, agreed with Steward, and reversed his conviction on one count.[96] In so doing, the court undertook an extensive analysis of relevant CSAAS periodical literature and case law from other jurisdictions. The court stated that, according to the periodical literature, CSAAS was never intended to be a diagnostic device.[97] Rather, the court explained that CSAAS is a tool for treating child victims and for helping to explain the reactions of children who suffered sexual abuse—such as delayed reporting of the abuse or recantation of allegations of abuse.[98] The court then noted that case law from other jurisdictions typically prohibited the use of CSAAS evidence to show directly or by implication that the victim was abused.[99] However, some of the decisions did permit the introduction of such evidence to rehabilitate the victim when evidence was previously elicited showing that the victim delayed in reporting the abuse or recanted allegations of abuse.[100]

The *Steward* court then determined the outcome of the case by employing the Indiana Rules of Evidence. The court noted that Rule 702(b) requires expert scientific testimony to be based upon reliable scientific principles.[101] Stating that the scientific reliability of CSAAS evidence to prove actual abuse is extremely doubtful and the subject of continued dispute among the legal and scientific communities, the court held that CSAAS evidence is not admissible to prove that sexual abuse occurred.[102] The court emphasized that CSAAS evidence is not admissible to prove abuse even when the expert does not explicitly opine that the victim in a given case was sexually abused.[103] The court reasoned that where an expert testifies that a victim exhibits CSAAS traits, the jury still may tend to infer that the child was abused.[104] This type of inference, the court stated, is forbidden

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93. 652 N.E.2d 490 (Ind. 1995).
94. *Id.* at 492.
95. *Id.*
96. *Id.* at 499-500.
97. *Id.* at 493.
98. *Id.*
99. *Id.* at 495-97.
100. *Id.*
101. *Id.* at 498; *see also* IND. R. EVID. 702(b)(1).
102. *Steward*, 652 N.E.2d at 499.
103. *Id.*
104. *Id.*

by Rule 403, which prohibits evidence that may potentially mislead the jury.[105] However, the court did not foreclose the possibility that sometime in the future, CSAAS evidence could be admissible to prove abuse, provided that subsequent scientific research and investigation sufficiently established the reliability of CSAAS evidence.[106]

Nevertheless, the court ultimately held that CSAAS evidence is admissible for the limited purpose of rehabilitating the victim if the defense discusses or presents evidence of the victim's behavior that is inconsistent with the allegations of abuse, or if the victim recants his or her prior allegation of abuse.[107] The court stated that Rule 702 does not prohibit the admission of CSAAS evidence for rehabilitating the victim because established research already accepts such evidence as reliable for explaining that sexual abuse victims typically exhibit behavior inconsistent with their allegations of abuse.[108] Furthermore, the court noted that Rule 403 does not prohibit the admission of the evidence for the limited purpose of rehabilitating the victim when the evidence is not unfairly prejudicial because "it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility."[109]

3. Impeachment Evidence.—In *Price v. State*,[110] the Indiana Court of Appeals continued to limit the types of evidence of prior criminal convictions that may be used to impeach the credibility of a witness. Price was convicted of burglary and sexual battery. A key witness for the State had previously been convicted of child molesting. On cross examination, the trial court prevented Price from using the child molestation conviction to impeach the witness's credibility.[111] On appeal, Price argued that he should have been permitted to use the prior conviction to impeach the witness.

The court of appeals, citing the Indiana Supreme Court's decision in *Ashton v. Anderson*,[112] found that the trial court properly prohibited Price from using the witness's prior child molestation conviction as impeachment evidence.[113] The court stated that the *Ashton* rule[114] allows a party to use as impeachment evidence

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105. *Id.* Although probative evidence may be excluded if it has the potential of misleading the jury, that potential must itself be great: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed by* the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Ind. R. Evid. 403 (emphasis added).

106. *Steward*, 652 N.E.2d at 499.

107. *Id.*

108. *Id.*

109. *Id.* (quoting State v. Moran, 728 P.2d 248, 251-52 (Ariz. 1986)).

110. 656 N.E.2d 860 (Ind. Ct. App. 1995), *trans. denied.*

111. *Id.* at 862.

112. 279 N.E.2d 210 (Ind. 1972).

113. *Price*, 656 N.E.2d at 863.

114. *Id.* at 862. It should be noted that the court based its decision upon *Ashton* rather than IND. R. EVID. 609, which now governs the use of prior convictions as impeachment evidence. It is presumed that the court employed *Ashton* rather than Rule 609 because Price was convicted prior

only those crimes involving dishonesty or false statement's, or "infamous crimes," including the crime of rape.[115] Price argued that because the witness was convicted of child molestation based upon an act of intercourse, the witness's conviction was the functional equivalent of rape, and, therefore, the conviction was proper impeachment evidence under *Ashton*.[116]

In rejecting Price's claim, the court focused on its prior decision in *Sullivan v. Fairmont Homes, Inc.*,[117] a civil case in which the court held that child molestation is not the equivalent of rape for *Ashton* purposes.[118] The *Price* court extended the *Sullivan* ruling to include the criminal realm and again held that child molestation was not an "infamous crime" under *Ashton*.[119] The court acknowledged that, unlike the civil litigants in *Sullivan*, Price possessed the right to confront and cross-examine the witnesses against him.[120] However, the court stopped short of undertaking a detailed analysis of the confrontation issue. [121]

C. Insanity Defense

In *State v. Van Orden*,[122] the Indiana Court of Appeals discussed the legal implications of the administration of anti-psychotic medication to a defendant during proceedings against that defendant. Julie Van Orden, charged with the murder of a former Evansville mayor, raised the insanity defense at trial.[123] Court-appointed doctors diagnosed Van Orden as a paranoid schizophrenic. Refusing to take medication recommended for her schizophrenia, Van Orden was declared incompetent to stand trial.[124] However, after being hospitalized in a mental institution, Van Orden agreed to take the medication because she wished to stand

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to the effective date of the Indiana Rules of Evidence. However, because Rule 609 is substantially similar to the *Ashton* rule, the court probably would have reached the same result had it decided the case under Rule 609.

115. *Price*, 656 N.E.2d at 862.

116. *Id.* at 863.

117. 543 N.E.2d 1130 (Ind. Ct. App. 1989), *trans. denied.*

118. *Id.* at 1136.

119. *Price*, 656 N.E.2d at 863.

120. *Id.*

121. In fact, the court undertook a very cursory analysis of the confrontation issue. In justifying its holding, the court stated that *Sullivan* was grounded upon the Indiana Supreme Court's decision in Fletcher v. State, 340 N.E.2d 771 (Ind. 1976), in which the Supreme Court "declined to judicially extend the specifically enumerated *Ashton* crimes without direction from [the] legislature." *Price*, 656 N.E.2d at 863. As noted above, the Supreme Court denied transfer in *Price*. Thus, it appears that for the time being, impeachment evidence will be specifically limited to the crimes set forth in *Ashton* or Rule 609.

122. 647 N.E.2d 641 (Ind. Ct. App. 1995), *trans. denied.*

123. *Id.* at 643.

124. *Id.*

trial.[125] At trial, Van Orden appeared before the jury in a medicated state[126] and was convicted of murder.[127]

After losing her direct appeal, Van Orden filed a petition for post-conviction relief in the trial court.[128] The trial court granted Van Orden's petition, finding that she was involuntarily medicated to achieve competency to stand trial in violation of her due process rights and that defense counsel failed to introduce evidence distinguishing between her behavior with and without the medication.[129] The State appealed.

The court of appeals reversed. The court first found that while Van Orden had a protected liberty interest under the Due Process Clause against the unwanted and unnecessary administration of the medication,[130] there was no evidence that Van Orden was involuntarily medicated.[131] The court noted that while Van Orden originally objected to the administration of the medication, she readily acquiesced in its administration after she determined that she wished to stand trial.[132] Furthermore, the court held that the mere fact that she was confined at the time of receiving the medication did not make its administration involuntary.[133]

Next, the court held that the jury was adequately informed as to the type of medication Van Orden was receiving as well as the effect of the medication on her behavior.[134] The court stated that when a defendant raises the insanity defense, the jury is entitled to consider the defendant's in-court behavior and demeanor.[135] However, the court found that Van Orden presented substantial evidence of her mental health history to allow a jury to recognize that her calm demeanor at trial was the result of the medication.[136]

D. Jury Instructions

Two recent appellate decisions have focused on the propriety of different types of jury instructions. First, *Wright v. State*,[137] an Indiana Supreme Court decision, is the most significant case addressing jury instructions in 1995. Prior to *Wright*, several decisions relied upon dicta from the Indiana Supreme Court's decision in *Jones v. State*[138] to hold that the State, by drafting a charging instrument to track

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125. *Id.* at 644.
126. *Id.*
127. *Id.* at 643.
128. *Id.*
129. *Id.* at 643-44, 645.
130. *Id.* at 644 (citing Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 269 (1990)).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 645.
135. *Id.* (citing Chambers v. Mississippi, 410 U.S. 284 (1973)).
136. *Id.*
137. 658 N.E.2d 563 (Ind. 1995).
138. 438 N.E.2d 972 (Ind. 1982) ("[T]he state through [its] drafting can foreclose as to the

statutory language defining the offense charged, could foreclose an instruction on a lesser included offense of the offense charged.[139] These cases reason that, to allow the State to charge one offense and then to allow the court to instruct the jury on a lesser included offense, would permit the jury to reach a "compromise verdict."[140] However, the court in *Wright* explicitly overruled these cases to the extent that they suggested or inferred that the State could preclude a lesser included offense instruction by the way the State framed the charge in the charging instrument.[141]

Wright was convicted of reckless homicide for the stabbing death of his nephew. The State charged Wright only with murder, but the jury returned a verdict of reckless homicide, a lesser included offense of murder, after the trial court instructed the jury on reckless homicide.[142] Relying on *Jones'* progeny, the court of appeals, in a divided decision, reversed Wright's conviction, finding that it was a violation of due process to convict Wright of an offense with which he was not charged.[143]

The Indiana Supreme Court granted transfer and affirmed Wright's conviction.[144] The court enunciated a three-part analysis to determine whether a trial court may properly give a lesser included offense instruction when a party to the case requests that one be given. First, the trial court must compare the statute defining the crime charged with the statute defining the lesser included offense and determine whether the alleged lesser included offense is "inherently" included within the crime charged.[145] Second, if the trial court determines that the alleged lesser included offense is not inherently included in the crime charged, then it must compare the statute defining the alleged lesser included offense with the charging instrument filed by the State to determine whether the alleged lesser included offense is "factually" included within the crime charged.[146] If the trial court determines that the alleged lesser included offense is either inherently or factually included in the crime charged, it *must* give the requested lesser included

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defendant, the tactical opportunity to seek a conviction for a lesser offense.").

139. Compton v. State, 465 N.E.2d 711, 713 (Ind. 1984); Sills v. State, 463 N.E.2d 228, 235-36 (Ind. 1984).

140. *Sills*, 463 N.E.2d at 235.

141. *Wright*, 658 N.E.2d at 570.

142. *Id.* at 565-66.

143. *Id.* at 566.

144. *Id.* at 572.

145. A lesser included offense is inherently included in the offense charged if:

> (a) the alleged lesser included offense may be established 'by proof of the same material elements or less than all the material elements' defining the crime charged . . . or (b) the only feature distinguishing the alleged lesser included offense from the crime charged is that a lesser culpability is required to establish the commission of the lesser offense.

Id. at 566 (quoting IND. CODE § 35-41-1-16 (1993)).

146. "If the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense, then the alleged lesser included offense is *factually* included in the crime charged . . . ." *Id.* at 567.

offense instruction if there is a "serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater."[147] The court emphasized that the wording of a charging instrument may never preclude an instruction on an inherently lesser included offense.[148] The court then employed this analysis and held that because reckless homicide is an inherently included offense of murder, the court of appeals was wrong in reversing Wright's conviction.[149]

The second appellate court decision to focus on the propriety of jury instructions was *Harvey v. State*,[150] which involved a novel jury instruction relating to the defendant's claim of self defense. Harvey was convicted of murder. The evidence at trial demonstrated that Harvey admitted to police that he did not have a license to carry the handgun he used to commit the murder.[151] The trial court gave the following instruction to the jury: "A person who is not in his home or fixed place of business and is carrying a handgun without a license cannot by law claim the protection of the law of self defense."[152] On appeal, Harvey claimed that this instruction deprived him of his only defense to the murder charge.[153]

The court of appeals agreed with Harvey and reversed his conviction.[154] The court examined Indiana Code section 35-41-3-2(d)(1), which provides that a person may not plead self defense if the person "is committing, or escaping after the commission of, a crime."[155] The court stated that a literal interpretation of this section of the self defense statute would authorize the trial court's instruction.[156] However, noting that self defense is "firmly entrenched" in the law of Indiana as a defense to criminal conduct, the court held that subsection (d)(1) of the self defense statute was intended to preclude the defense only where the defendant engaged in the commission of a crime and where that crime "produced the confrontation wherein the force was employed."[157] The court noted that the trial

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147. *Id.* In a concurring opinion, Justice DeBruler disagreed with the requirement that the trial judge evaluate the evidence to determine the propriety of a lesser included offense instruction. *Id.* at 572. Justice DeBruler felt that this requirement rests upon the incorrect assumption that unless the court evaluates the evidence, the jury will render a compromise verdict. *Id.*

148. *Id.* at 570.

149. *Id.* at 567.

150. 652 N.E.2d 876 (Ind. Ct. App. 1995), *trans. denied.*

151. *Id.* at 876.

152. *Id.*

153. *Id.*

154. *Id.* at 877.

155. *Id.*

156. *Id.*

157. *Id.* The court stated that if subsection (d)(1) were taken literally, then a person could not claim self defense if the person, at the time he acted, was coincidentally committing some criminal offense. *Id.* The court cited examples such as possession of a marijuana cigarette or the failure to file an income tax return. *Id.* However, the court did not specifically address how great of a nexus must exist between the crime that the person is committing and the confrontation to

court's instruction disregarded any connection between Harvey's unlawful possession of the firearm and the shooting.[158] It will be interesting to observe the development of this interpretation of the self defense statute, especially if the appellate courts have an opportunity to address it in the context of other crimes.

E. Search and Seizure

Three 1995 decisions discussed search and seizure issues never addressed in the Indiana appellate courts. In *Cutter v. State*,[159] the court of appeals addressed whether a valid search warrant authorizing a search for bodily samples also authorized the seizure of the defendant to obtain those samples. A judge issued a search warrant authorizing the police to search Cutter, a murder suspect, and to seize from him several different bodily samples, including hair, saliva and blood.[160] Cutter argued that when police transported him to a hospital to obtain the samples, this amounted to a "seizure" of his person for Fourth Amendment purposes which the search warrant issued by the judge did not authorize.[161]

The court rejected Cutter's claim and affirmed the trial court's denial of his motion to suppress the evidence.[162] In doing so, the court relied on an Ohio appellate court decision, *State v. Kutz*.[163] In *Kutz*, the defendant moved to suppress evidence of a blood sample taken from him where police obtained a search warrant to obtain the blood but had not placed the defendant under arrest.[164] The *Cutter* court held that a valid search warrant authorizing the taking of bodily samples also authorizes the detention of the person who is the subject of the warrant to the extent necessary to obtain the samples.[165]

In two companion cases, the Indiana Court of Appeals also discussed the "plain feel" doctrine as it relates to a *Terry*[166] "stop and frisk." In the first case, *C.D.T. v. State*,[167]police officers were dispatched to investigate complaints of

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which the person is claiming self defense in order for the option of self defense to be eliminated under the self defense statute. It would seem that in *Harvey*, the shooting would not have occurred but for Harvey's possession of the gun. This certainly presents a different situation than if Harvey had possessed a marijuana cigarette at the time of the shooting. Perhaps the extent of the nexus required will be clarified in future decisions.

158. *Id.*

159. 646 N.E.2d 704 (Ind. Ct. App. 1995), *trans. denied.*

160. *Id.* at 709.

161. *Id.* at 711.

162. *Id.* at 715.

163. 622 N.E.2d 362 (Ohio Ct. App. 1993).

164. *Cutter*, 646 N.E.2d at 711.

165. *Id.* "In the present case, a valid search warrant was obtained prior to obtaining the [bodily] sample[s] from [Cutter]. Because police had a valid search warrant, whether [Cutter] was under arrest at the time the [bodily] sample[s] [were] obtained is of no consequence." *Id.* (quoting *Kutz*, 622 N.E.2d at 365).

166. Terry v. Ohio, 392 U.S. 1 (1968).

167. 653 N.E.2d 1041 (Ind. Ct. App. 1995).

"open air" drug dealing.[168] The officers observed a car stopped in the middle of the street and C.D.T., a juvenile, leaning into the passenger side of the car with his hands inside the passenger window.[169] One officer approached C.D.T. and conducted a pat search of C.D.T.'s outer garments for weapons.[170] The search revealed no weapons but did uncover a crumpled plastic bag in C.D.T.'s front pants pocket.[171] The officer removed the bag and found cocaine inside.[172] After C.D.T. was charged with possession of cocaine in juvenile court, his motion to suppress the contents of the bag was denied.[173]

The court of appeals reversed the juvenile court's delinquency adjudication of C.D.T. after C.D.T. appealed the juvenile court's denial of his motion to suppress.[174] The court of appeals reviewed the officer's stop and search of C.D.T. under the *Terry* "stop and frisk" exception to the Fourth Amendment's warrant requirement.[175] The court reiterated that the purpose of a *Terry* "patdown" of a suspect's outer garments during an investigatory stop is to reveal concealed weapons and not to discover evidence of a crime.[176] However, addressing the State's argument that the plain feel doctrine lawfully permitted the officer to seize the cocaine from C.D.T.,[177] the court for the first time considered the "plain feel" doctrine as set forth in the United States Supreme Court case of *Minnesota v. Dickerson*.[178]

As set forth in *Dickerson*, the plain feel doctrine permits police officers to seize non-threatening contraband discovered during a *Terry* patdown search so long as the search remains within the scope of a valid *Terry* frisk and the officer "feels an object whose contour or mass makes its identity immediately apparent."[179] The court of appeals, relying on an Illinois case[180] that applied the *Dickerson* plain feel test, held that because the officer had already determined that C.D.T. possessed no weapons by the time he seized the cocaine, the search for and seizure of the cocaine was unlawful.[181] This decision suggests that in order for the plain feel doctrine to apply to a given *Terry* frisk, the State must demonstrate that the following factors are present: (1) the discovery of the non-threatening

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168. *Id.* at 1043.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1048.
175. *Id.* at 1044-45.
176. *Id.* at 1045.
177. *Id.*
178. 508 U.S. 366 (1993).
179. *C.D.T.*, 653 N.E.2d at 1045 (quoting Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993)).
180. People v. Blake, 645 N.E.2d 580 (Ill. App. Ct. 1995), *cert. denied*, 649 N.E.2d 419 (Ill. 1995).
181. *C.D.T.*, 653 N.E.2d at 1046.

contraband must occur during the course of the *Terry* patdown and before the searching officer determines that the suspect is carrying no concealed weapons; and (2) the identity of the contraband must be immediately apparent to the officer upon the officer's feeling of it.

The court of appeals was presented with a different situation in *Drake v. State*.[182] In *Drake*, a police officer conducted a weapons patdown of Drake after the officer discovered Drake asleep in a parked, running car containing a broken steering column, two television sets and a large plastic bag in the passenger compartment. During the search, the officer felt a hard piece of material in Drake's right pants pocket that the officer believed was a weapon.[183] The officer asked Drake to remove the item and Drake pulled out a large roll of cash. When Drake pulled the money out, a plastic bag containing cocaine fell from the middle of the roll to the ground.[184] Drake was convicted of possession of cocaine after the trial court denied his motion to suppress the cocaine.[185]

On appeal, the court of appeals affirmed Drake's conviction.[186] Drake argued that the cocaine was seized as the result of a search that went beyond the scope permitted by *Terry*.[187] The court disagreed, specifically noting that unlike the search in *C.D.T.*, the officer's discovery of the cocaine on Drake occurred during the officer's search for weapons.[188] The court also concluded that the officer had reasonable grounds to believe that the hard object was a weapon.[189]

F. Sentencing

Several recent cases from the court of appeals interpreted the language in the new version of Indiana Code section 35-50-1-2, which provides that the sentence for crimes committed in one "episode of criminal conduct" may not exceed the presumptive term of imprisonment for a felony one class higher than the highest class of felony for which the defendant had been convicted.[190] In *Tedlock v. State*,[191] Tedlock had sold fraudulent securities to several people at different times over the course of two years. Each sale was separated by several weeks or, in one case, by several months. Tedlock pled guilty to four counts of securities fraud, all class C felonies, and was sentenced to an aggregate sixteen years. Tedlock argued that the sales constituted "an episode," and that he could only be sentenced to the presumptive ten-year term for a class B felony.

The State initially argued that Tedlock was not entitled to the benefit of the

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182. 655 N.E.2d 574 (Ind. Ct. App. 1995).
183. *Id.* at 576.
184. *Id.* at 575.
185. *Id.*
186. *Id.* at 577.
187. *Id.* at 575.
188. *Id.*
189. *Id.* at 577.
190. IND. CODE § 35-50-1-2 (Supp. 1995).
191. 656 N.E.2d 273 (Ind. Ct. App. 1995).

new sentencing provision because the statute in effect at the time of the crime did not provide for an upper limit, or cap, for his sentences. Citing the doctrine of amelioration,[192] the court determined that Tedlock was entitled to retroactive application of the "episode" language in the amendment, because it had been enacted after the crimes but prior to his sentencing.

The court went on to determine that in order for several crimes to be considered an "episode," the crimes must be closely related in time and space.[193] In defining an "episode," the court took into account the legislature's amendment of Indiana Code section 35-50-1-2, which provided that an "episode of criminal conduct" constitutes "offenses or a connected series of offense that are closely related in time and circumstance."[194] Because each sale of fraudulent securities was separated by a substantial amount of time, the court found that the sales did not constitute a single "episode" so as to cap the amount of time to which Tedlock could be sentenced.

In two cases following *Tedlock*, the definition of an episode became less clear. These decisions were very fact-sensitive, and seem to have taken a common-sense approach to the definition of "episode." In *Trei v. State*,[195] the defendant jumped out from behind a tree as the female victim and her friend were walking. He held the two at knifepoint while he raped one of the victims. He was convicted of sexual misconduct with a minor, a class A felony, and two counts of confinement, both class B felonies. He was sentenced to serve forty-five years on the sexual misconduct conviction and twenty years for each confinement conviction. The sentence for the sexual misconduct conviction and one of the confinement convictions were to be served concurrently, while the second confinement conviction was to be served consecutively to those sentences, resulting in an aggregate term of sixty-five years imprisonment. The court of appeals held that the three crimes constituted one "episode" and that the defendant's sentence could not exceed the presumptive fifty-year term for murder, which was one class of felony higher than the class A felony of sexual misconduct.[196] The court remanded the case to the trial court for imposition of the maximum fifty-year term.

Conversely, in *Reynolds v. State*,[197] the Defendant burglarized three separate homes in a single day. The trial court sentenced him to serve twenty years for each burglary conviction, to be served consecutive to one another. Taking the definition of "episode" in *Tedlock* into account, the court of appeals determined that each burglary constituted a "distinct episode in itself," because the burglaries were neither simultaneously committed nor contemporaneous with one another

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192. The doctrine of amelioration provides that a defendant may take advantage of an ameliorative amendment that decreases the penalty for a crime after the defendant has committed it but prior to his sentencing. *Id.* at 275.

193. *Id.* at 276.

194. *Id.* at 275.

195. 658 N.E.2d 131 (Ind. Ct. App. 1995).

196. *Id.* at 134.

197. 657 N.E.2d 438 (Ind. Ct. App. 1995).

and each burglary could be described without reference to the other burglaries.[198] The defendant could therefore be sentenced to serve the twenty-year sentences for each crime consecutively because the sentencing cap did not apply.

Another recent development in the area of consecutive sentencing implicating Indiana Code section 35-50-1-2, includes a case in which the court of appeals determined when a defendant must be sentenced to consecutive terms for a crime committed after he had been arrested and released "on bond." In *Martin v. State*,[199] the court noted that the circumstances under which a trial court must impose consecutive sentences include those in which a criminal act is committed while another criminal matter is pending.[200] Martin had committed a battery, and, while still subject to conditions imposed by an agreement executed with the prosecution, he committed a second and third battery. The agreement he executed was revocable if he failed to perform the conditions. The court concluded that he was "on bond" within the meaning of the statute because he had not yet performed the conditions imposed in the agreement.[201] Once conditions contained in such an agreement are performed, however, the charge is resolved and the defendant is no longer subject to mandatory consecutive sentences because he is no longer "on bond."[202] Because Martin committed the second and third batteries prior to performance of the conditions set out in the agreement, he was subject to consecutive sentencing.

An additional noteworthy case, *State v. Messenger*,[203] involved the vacation of a previous enhancement to an underlying conviction. In February 1993, Messenger was charged with Operating a Vehicle while Intoxicated with a Prior Conviction of Operating While Intoxicated (OWI with a prior) and Operating a Vehicle with ten hundredths percent or more by weight of alcohol in his blood with a Prior Conviction of Operating While Intoxicated. Both charges were filed as class D felonies because of two previous convictions: a 1988 conviction for Operating a Vehicle While Intoxicated, a class A misdemeanor, and a 1991 conviction for Operating a Vehicle While Intoxicated with a Prior Conviction, a class D felony. At some point, Messenger had successfully challenged the 1988 conviction by way of a petition for post-conviction relief. While the 1993 charges were pending, he made a similar challenge to the 1991 conviction, arguing that the conviction should be vacated because the 1988 conviction upon which it was based had been vacated. The post-conviction court agreed and vacated the 1991 class D felony conviction. However, on August 13, 1993,[204] the court entered the

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198. *Id.* at 441.

199. 645 N.E.2d 1100 (Ind. Ct. App. 1995). This case is the decision upon the petition for rehearing filed by the State. The original decision that the court reversed in the present opinion may be found at 638 N.E.2d 1349 (Ind. Ct. App. 1994).

200. *Martin*, 645 N.E.2d at 1102.

201. *Id.*

202. *Id.*

203. 650 N.E.2d 702 (Ind. Ct. App. 1995).

204. Although the order was dated July 13, 1993, there is some confusion in the opinion as to whether the order was actually dated July 13, 1993 or August 13, 1993.

conviction as a class A misdemeanor.[205]

Messenger then filed a motion to dismiss the two 1993 charges because the 1991 conviction was no longer a "prior" conviction due to the trial court's August 1993 entry. The trial court dismissed both charges. In an interlocutory appeal, taken by the State, Judge Rucker used complex reasoning to conclude that the trial court had erroneously dismissed the 1993 charges. The court held that where a defendant successfully challenges the enhancement of his OWI conviction, the underlying offense is not disturbed.[206] Thus, the underlying 1991 conviction, the class A misdemeanor, was not vacated but remained a "prior" conviction for purposes of the 1993 charges.[207] The August 13, 1993 order operated only to set aside the enhanced portion of Messenger's offense.[208]

In his dissent, Judge Sullivan disagreed with the majority's conclusion that the order of August 13th vacated only the enhancement. Instead, he determined that the trial court's order had vacated Messenger's entire conviction.[209] Judge Sullivan concluded that the August 13 order was not a *nunc pro tunc* entry, agreeing with Messenger that his conviction was not "prior" for purposes of the pending charge.[210]

G. Double Jeopardy

Several recent developments in Indiana clarify the law regarding double jeopardy analysis. In *Wethington v. State,*[211] the court seemed to use a different analysis in determining that a defendant had not been placed in jeopardy twice for his conduct. Wethington abducted the victim in her vehicle, demanded her money, threatened to kill her, and repeatedly struck her in the head with a tire iron. Wethington was convicted of robbery, as a class A felony, kidnapping, attempted murder, and auto theft. The court held that his attempted murder conviction, which required an intent to kill, was based upon his intentional act in swinging the tire iron at the victim, regardless of whether he actually inflicted any injury.[212] However, the serious bodily injury used to elevate the defendant's conviction of robbery to a class A felony required no intent.[213] Because Wethington had inflicted multiple injuries upon the victim, the injuries were not a single act. Thus, the court explicitly held that his convictions of attempted murder and robbery as a class A felony were based upon different acts.[214] Notably, the court did find that the auto theft charge of which Wethington had been convicted was a lesser

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205. *Messenger*, 650 N.E.2d at 703.
206. *Id.* at 704.
207. *Id.* at 704-05.
208. *Id.* at 704.
209. *Id.* at 705.
210. *Id.*
211. 655 N.E.2d 91 (Ind. Ct. App. 1995).
212. *Id.* at 96.
213. *Id.*
214. *Id.* at 96-97.

included offense of his robbery conviction because both convictions were based upon the taking of the same car.[215] The court concluded that the auto theft conviction violated his double jeopardy rights and vacated the conviction.[216]

In *State v. Allen*,[217] the State appealed the trial court's dismissal of conspiracy charges against two defendants. In *Allen*, Flora and Darlene Allen had been charged in federal court with conspiracy to possess with the intent to distribute and deliver cocaine. Both pled guilty to the federal conspiracy charge. They were then indicted on several charges, including a charge of Corrupt Business Influence based upon Indiana's Racketeer Influenced and Corrupt Organizations statute (RICO)[218] and conspiracy to deliver cocaine. The trial court determined that prosecution upon the state charges was barred due to the prior federal prosecution for the same conduct and subsequently dismissed the charges as to both Flora and Darlene. The court of appeals determined that the trial court erred in dismissing the Indiana RICO charges, but concluded that the state conspiracy prosecution was barred by Indiana's double jeopardy statute[219] and the conspiracy charge encompassed the same acts as the federal charge.

Relying mainly upon federal law, Judge Sullivan determined that the predicate offense for the Indiana RICO charge, the conspiracy to possess cocaine, was based upon the same conduct for which the defendants were convicted in the federal court.[220] However, the state charges did not violate Indiana's double jeopardy prohibition.[221] After finding that the Indiana legislature intended separate offenses for RICO charges and the predicate offenses charged therein, the court went on to conclude that the conspiracy to possess and deliver cocaine offense is not the "same offense" as an Indiana RICO violation because it requires proof of different elements than those required for the federal conspiracy charge.[222] In analyzing the predicate offenses for the RICO charges against Flora, the court found that because the prosecution for the underlying felonies did not violate double jeopardy, the RICO prosecution did not do so.[223] The court noted that she could be convicted of three counts of possession of cocaine as well as the federal conspiracy conviction without being subject to double jeopardy.[224] Thus, the state possession charges were different from that charged in the federal conspiracy count,[225] and, while the possession charges were the underlying felonies for the federal conspiracy charge, Flora could be subsequently prosecuted for the state

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215. *Id.* at 97.

216. *Id.*

217. 646 N.E.2d 965 (Ind. Ct. App. 1995).

218. IND. CODE §§ 35-45-6-1, -2 (1993).

219. IND. CODE § 35-41-4-5 (1993) (preclusive effect of former prosecutions in other jurisdictions).

220. *Allen*, 646 N.E.2d at 970.

221. *Id.*

222. *Id.* at 971.

223. *Id.* at 970-71.

224. *Id.* at 970.

225. *Id.*

RICO charges.

Likewise, the court held that Darlene was not subjected to double jeopardy where the State used two instances of possession of cocaine as predicate offenses, though she had been convicted of the federal conspiracy charge based upon the same conduct.[226] In so doing, the court cited federal law holding that a conspiracy conviction for possession or delivery of cocaine "may be used as a predicate offense for a RICO violation without violating double jeopardy."[227] The court did find, however, that the state prosecution for conspiracy to deliver cocaine constituted double jeopardy because it was clearly based upon conduct encompassed within the federal conspiracy charge.[228]

This year, the court also held that more than one hearing on a probation violation does not implicate double jeopardy concerns. In *Childers v. State,*[229] the court found that double jeopardy had not been implicated where the defendant's probation had been revoked based upon his escape from a county jail, the court later rescinded the revocation of probation, and the defendant was then subject to a second probation revocation hearing where his probation was finally revoked.[230] Double jeopardy prohibitions were not violated in the *Childers* case because the law does not consider a probation violation an "offense" for purposes of the Clause; instead, revocation proceedings are based only upon the violation of probation conditions, rather than upon the commission of a crime.[231]

In a related area, the court of appeals determined that administrative punishment of an inmate by prison officials does not preclude the State's subsequent criminal prosecution for the same acts. In *State v. Mullins,*[232] Mullins had been involved in a scuffle with a corrections officer. The court held that the Department of Correction may impose discipline, but may not lengthen a prison term based upon behavior committed within an institution.[233] Although the administrative action deprived Mullins of credit time, it did not impinge upon her liberty interest and, subsequently, did not trigger double jeopardy concerns.[234] The court found that the principle of double jeopardy applies only to criminal prosecutions.[235] Therefore, the administrative proceeding and its attendant consequences to Mullins did not preclude a subsequent criminal prosecution for battery.

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226. *Id.* at 971.
227. *Id.*
228. *Id.* at 972.
229. 656 N.E.2d 514 (Ind. Ct. App. 1995).
230. *Id.* at 515.
231. *Id.* at 517.
232. 647 N.E.2d 676 (Ind. Ct. App. 1995).
233. *Id.* at 678.
234. *Id.*
235. *Id.*

H. Due Process

An interesting development in the area of due process hinged upon the Indiana Supreme Court's analysis of Indiana Code section 35-26-7-1, which allows for permissive continuances and those continuances that the trial court must grant as a matter of right. In *Flowers v. State*,[236] the trial court denied the defendant's motion for continuance based upon the withdrawal of his DNA expert. Flowers obtained a second DNA expert, but the expert could not be prepared for trial until the following day. The court stated that a defendant is entitled to a continuance as a matter of right if he meets the requirements set out in the statute.[237] However, if the defendant does not meet the statutory requirements, the court must engage in a balancing test, weighing the interests of the State against those of the defendant.[238] The court made clear that if the trial court does not engage in the mandated balancing of the parties' interests in determining whether to grant a discretionary continuance, it abuses its discretion and, consequently, violates the defendant's due process rights.[239] Here, the defendant did not meet the requirements for a continuance as a right; however, the trial court had not engaged in the balancing process in denying his request for a continuance. Consequently, the case was remanded for a new trial.

In *Braxton v. State*,[240] the Indiana Supreme Court addressed the procedural limits placed upon probation revocations by the Due Process Clause. In 1992, Braxton had pled guilty to three counts of dealing in cocaine. She was sentenced to serve fifteen years, with one year executed, one year on home detention, and thirteen years on probation. After she began serving her term of home detention, Braxton was charged with violating the conditions of her detention by tampering with her monitoring device. When she was arrested for violating home detention, she became unruly enough for the police to charge her with disorderly conduct. After an inventory search, she was charged with possession of marijuana and tested positive for the drug. The court noted that the Due Process Clause requires that a probationer be accorded written notice of alleged violations.[241] Although the trial court had not informed her that the conditions of her home detention were also conditions of her probation, that omission was immaterial because "it is always a condition of probation that a probationer not commit an additional crime."[242] Because Braxton had been informed at the revocation hearing that the State sought probation revocation and because she had written notice of the alleged violations, the requirements of due process were satisfied.

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236. 654 N.E.2d 1124 (Ind. 1995).

237. *Id.* at 1125. In the opinion, the court does not enumerate the requirements or conditions to which it refers.

238. *Id.*

239. *Id.*

240. 651 N.E.2d 268 (Ind. 1995).

241. *Id.* at 270 (citing IND. CODE § 35-28-2-1(a) (1993)).

242. *Id.*

I. Controlled Substances Excise Tax and Forfeiture Law

The Indiana Supreme Court has recently made several determinations relative to Indiana's drug tax, known as the Controlled Substances Excise Tax, or CSET.[243] In *Bryant v. State*,[244] the court held that a prosecution for the failure to pay the civil CSET sanctions, pursuant to Indiana Code sections 6-7-3-8[245] and 6-7-3-11,[246] is a punishment for the purposes of double jeopardy.[247] After responding to a break-in at Bryant's home, police discovered over 250 marijuana plants, dried seeds, and assorted paraphernalia. The Indiana Department of Revenue assessed a tax of $83,680. When Bryant did not immediately pay the tax upon the demand of the Department's agent, the Department assessed a one-hundred percent penalty, which increased Bryant's total obligation to $167,360. In addition, the Department seized Bryant's home. The State later filed criminal charges against Bryant. He was charged with the failure to pay the CSET, a class D felony;[248] growing and cultivating over 30 grams of marijuana, a class D felony;[249] maintaining a common nuisance, a class D felony;[250] and possession of less than 30 grams of marijuana, a class A misdemeanor.[251] Bryant was convicted on all four counts.

The court noted that the Double Jeopardy Clause prohibits subsequent prosecution after either acquittal or conviction, as well as multiple punishment for the same offense.[252] In determining whether the CSET's civil sanctions constituted a punishment in addition to its criminal penalties, the court relied heavily upon the recent United States Supreme Court decision *Department of Revenue of Montana v. Kurth Ranch*.[253] The court also considered four factors; (1) the deterrent, as opposed to the revenue, purpose of the tax; (2) the high rate of the tax; (3) the prerequisite of the commission of a criminal offense before its assessment; and (4) the nature of the tax.[254]

After applying the *Kurth Ranch* test, the court held that the "assessment of the

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243. IND. CODE §§ 6-7-3-1 to -17 (1993).

244. 660 N.E.2d 290 (Ind. 1995).

245. Indiana imposes a tax on the delivery, possession, or manufacture of controlled substances in Indiana in violation of IND. CODE § 35-48-4 or 21 U.S.C. §§ 841-852. IND. CODE § 6-7-3-8 (1993).

246. Indiana Code § 6-7-3-11(a) provides that a person who fails to pay the tax is subject to a penalty of 100% in addition to the tax, while subsection (b) provides that a person who delivers, possesses, or manufactures a controlled substance without having paid the tax due commits a class D felony. IND. CODE § 6-7-3-11 (1993).

247. *Bryant*, 660 N.E.2d at 297.

248. IND. CODE § 6-7-3-11(b) (1993).

249. *Id.* § 35-48-4-11(2).

250. *Id.* § 35-48-4-13 (Supp. 1995).

251. *Id.* §35-48-4-11(1).

252. Bryant v. State, 660 N.E.2d 290, 300 (Ind. 1995).

253. 114 S. Ct. 1937 (1994).

254. *Bryant*, 660 N.E.2d at 296.

CSET" constituted a punishment for purposes of double jeopardy.[255] Because the taxpayer was required to show a receipt to prove he paid the CSET, and that receipt was valid for only forty-eight hours, thus requiring the taxpayer to continually renew the receipt while he possessed the drug, the tax evidenced a deterrent purpose.[256] In applying the second prong of the test, the court noted that the high rate of the civil CSET penalty indicated a "punitive character."[257] The court stated that the tax could not be viewed as a normal excise tax.[258] Additionally, the CSET could only be assessed after the drugs had been confiscated, thereby limiting the imposition of the tax until after arrest.[259]

Once the court determined that the CSET's civil sanction was a "jeopardy," it employed the *Blockburger v. United States*[260] analysis to determine that imposing both the civil and the criminal sanctions of the CSET constituted dual punishments for the same offense.[261] The elements of the CSET's civil and criminal sanctions were identical, except for the mens rea requirements of Indiana Code section 6-7-3-11(b), and the elements of subsection (a) were included within subsection (b). Moreover, the opinion clearly held that the assessment of the CSET is a critical juncture at which jeopardy attaches.[262] Once the CSET has been assessed, jeopardy attaches, barring a defendant's subsequent prosecution for the failure to pay the tax.[263] The court left the decision whether to assess the civil penalty or to seek criminal prosecution under the statute to the Department of Revenue and the prosecutor or to the General Assembly.[264] Not only did the court vacate Bryant's criminal conviction under Indiana Code section 6-7-3-11(b), but it also determined that his convictions for growing more than 30 grams of marijuana and possessing more than thirty grams of marijuana were subsequent, and impermissible, "jeopardies" to which he should not have been subjected.[265]

In *Clifft v. Indiana Department of Revenue,*[266] the court followed *Bryant*, holding that jeopardy attached when the CSET is assessed and that a subsequent guilty plea constituted double jeopardy.[267] The Indiana Supreme Court also

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255. *Id.* at 296-97.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. 284 U.S. 299 (1932).
261. *Bryant*, 660 N.E.2d at 297-98.
262. *Id.* at 299.
263. *Id.* at 300.
264. *Id.*
265. *Id. Bryant* is also notable for the court's decision regarding the initial search of Bryant's house when police responded to the burglar alarm. The court recognized an exception to the Fourth Amendment's warrant requirements, holding that police may enter private property when they "reasonably believe that the premises have recently been or are being burglarized." *Id.*
266. 660 N.E.2d 310 (Ind. 1995).
267. *Id.* at 313.

applied the test enumerated in *Marchetti v. United States*[268] and *Grosso v. United States*[269] to uphold the CSET against a self-incrimination challenge.[270] The CSET does not require the impermissible disclosure of information admitting that the defendants conducted illegal activity; nor does the CSET require taxpayers to personally present themselves to the Department of Revenue.[271] Additionally, the CSET does not violate the precepts of procedural due process because it allows for meaningful relief, providing the equitable remedy of injunctive relief prior to the deprivation of the taxpayer's property, as well as the opportunity for administrative and judicial hearings after the deprivation.[272] In essence, the court held that the postponement of administrative and judicial remedies is not a denial of due process.[273]

In another case decided on the same day as *Bryant,* the Indiana Supreme Court determined that convictions of both dealing in cocaine and the failure to pay the CSET in the same proceeding violated double jeopardy. In *Collins v. State*,[274] the court affirmed the court of appeals decision vacating Collins' conviction for failing to pay the CSET because it violated the Double Jeopardy Clause. Because Collins had been subject to multiple punishments in a single proceeding, the analysis focused upon whether those punishments were for the "same offense," or whether one crime was included within the other.[275]

Comparing the elements required to convict Collins of delivering cocaine under Indiana Code section 35-48-4-1 to the elements required to convict him for failing to pay the CSET under Indiana Code section 6-7-3-11(b), the court determined that the convictions constituted punishments for the same offense.[276] Further, because the delivery of cocaine and the failure to pay the CSET were based upon the same cocaine, or *res*, the offense of delivery was encompassed within the elements of the CSET's "criminal penalty."[277] Thus, dealing is a lesser included offense of the CSET's criminal sanction because the only unique fact to be proven for a conviction under Indiana Code section 6-7-3-11(b) was the failure to pay the tax.[278]

However, in an interesting twist, the Indiana Supreme Court applied the conventional *Blockburger* double jeopardy analysis to another CSET case, *Whitt v. State*.[279] The court determined that sufficient evidence supported Whitt's conviction for possession of cocaine within one thousand feet of school property

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268. 390 U.S. 39, 47-48 (1968).
269. 390 U.S. 62 (1968).
270. *Clifft*, 660 N.E.2d at 314-17.
271. *Id.* at 316-17.
272. *Id.* at 318.
273. *Id.*
274. 659 N.E.2d 509 (Ind. 1995).
275. *Id.* at 509.
276. *Id.* at 510.
277. *Id.* at 511.
278. *Id.*
279. 659 N.E.2d 512 (Ind. 1995).

under Indiana Code section 35-48-4-6.[280] Further, Whitt's double jeopardy rights had not been violated because his conviction required that the State prove the element of possession within one thousand feet of school property, while his conviction under Indiana Code section 6-7-3-11(b) for failure to pay the CSET required that the State prove that he possessed cocaine without having paid the CSET.[281] Although Whitt cited *Kurth Ranch*[282] for the proposition that his convictions violated his double jeopardy rights, the court determined Whitt could be convicted of both possession of cocaine within one thousand feet of school property and of failing to pay the CSET because each crime contained an element that the other did not,[283] unlike Collins' convictions in *Collins v. State*.[284] The court did not apply the "same conduct" test to Whitt's convictions.

Whitt is particularly notable in that it appears to limit the application of the double jeopardy principles that the supreme court applied in *Bryant, Collins,* and *Clifft*, solely to cases in which the defendant is charged with dealing and failing to pay the CSET. In cases where the State charges the defendant with a drug-related crime that has an additional element, as it did in *Whitt*, there appears to be no prohibition of prosecuting him for both crimes. However, in light of the vacated offenses in *Bryant*, it remains to be seen whether the court will apply the same analysis to situations where a different combination of offenses is charged.

In a related area, the Indiana Court of Appeals in *Tracy v. State*,[285] made an interesting addition to the scant Indiana precedent regarding the forfeiture of property seized by law enforcement agencies as the result of a defendant's participation in a crime. Tracy had been the subject of a controlled buy in which Tracy and a cohort, Donald, exchanged $26,000 for 26 pounds of marijuana with an officer of the Hamilton County Drug Task Force. Both men were apprehended as they left the motel room with the marijuana. Donald had carried a compact disc case in which the men had brought the money for the purchase. Upon their arrest, police seized the case, the drug money and an additional amount of money unrelated to the buy from the compact disc case Donald was carrying. The State released the entire amount, $29,126.04, to the DEA several months prior to Tracy's guilty plea. In return, the Hamilton County Drug Task Force received forty percent of the proceeds.

Although Tracy relied on Indiana Code section 35-33-5-5 to contend that the State was required to hold all of the money until the final disposition of Tracy's case, the court of appeals determined that it was not necessary to determine that issue because there had been no "seizure" of the $26,000 within the definition of the statute—Tracy had consensually exchanged the money with the officer.[286] Because there was no seizure, the Drug Task Force was not required to hold the

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280. *Id.* at 513. *See* IND. CODE § 35-48-4-6 (1993).
281. *Whitt*, 659 N.E.2d at 514.
282. Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994).
283. *Whitt*, 659 N.E.2d at 514.
284. 659 N.E.2d 509 (Ind. 1995).
285. 655 N.E.2d 1232 (Ind. Ct. App. 1995).
286. *Id.* at 1235.

$26,000 until Tracy's final disposition.[287] Even had there been a seizure, the appellate court would not interpret the statute to apply to all property seized as a result of a criminal investigation; it would apply only to property seized under the specific circumstances enumerated in the statute.[288] Further, the court also determined that Donald carried the money at the time of his arrest and that Tracy failed to prove by a preponderance of the evidence that he was the rightful owner of the additional funds.[289]

In his dissent, Judge Friedlander disagreed with the court's disposition of the issue Tracy raised regarding whether the Drug Task Force had improperly neglected to obtain a court order prior to turning the money in excess of the $26,000 over to the DEA while Tracy's criminal case was ongoing.[290] Applying several federal courts' statutory construction of similar state laws, he astutely recognized that Indiana Code section 35-33-5-5(a) vested jurisdiction over the seized money in the state court because it had been seized as the result of an arrest.[291] Consequently, the dissent found that the transfer from the state police to the DEA was not authorized by the court having jurisdiction over the money.[292]

J. Guilty Pleas

This year, the Indiana Supreme Court laid to rest any confusion that might have arisen regarding the standard of review for the factual basis of a guilty plea. In *Butler v. State*,[293] the court of appeals granted post-conviction relief on finding that the trial court abused its discretion when it accepted Butler's guilty plea without proof of all the relevant facts constituting the elements of the crime, even though the defendant and the prosecutor acknowledged that the facts supported a plea.[294] Butler had initially been charged with several crimes resulting from an auto accident, including operating a motor vehicle while intoxicated causing death, reckless homicide, four counts of criminal recklessness causing serious bodily injury, four counts of operating a motor vehicle while intoxicated causing serious bodily injury, driving while suspended and an habitual substance offender charge. After pleading guilty to the habitual substance offender charge and operating a vehicle while intoxicated resulting in death or serious bodily injury, Butler challenged his status as an habitual substance offender through a petition for post-conviction relief. He claimed that at the time he pled guilty to the habitual substance offender charge he was unaware that the statute required the two prior convictions to be class A misdemeanors or felonies; one of his prior convictions was a class C misdemeanor. The post-conviction court had made a finding that,

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287. *Id.*
288. *Id.*
289. *Id.* at 1236.
290. *Id.* at 1236-37.
291. *Id.* at 1237.
292. *Id.*
293. 658 N.E.2d 72 (Ind. 1995).
294. *Id.* at 74.

contrary to his assertions, Butler had indeed been convicted of a class A, rather than a class C, misdemeanor.[295]

The court reframed Butler's issue as whether an adequate factual basis existed for his guilty plea rather than whether the trial court erred in its determination that he had committed two prior class A misdemeanors.[296] While acknowledging that a lower court has wide discretion regarding the various "degrees and inquiries" required by the circumstances, the Indiana Supreme Court enumerated the standard regarding the quantity and type of evidence that may constitute an adequate factual basis for a guilty plea: "a factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty."[297] The court noted that "relatively minimal" evidence has, in the past, constituted an adequate basis, and the court need not find proof of guilt beyond a reasonable doubt in order to support a guilty plea.[298] Using the post-conviction relief standard, the court concluded that Butler had not proven that he did not commit the predicate offenses because he acknowledged the allegations in the information and his two prior "D.U.I.'s" at the guilty plea hearing.[299] Because the evidence did not lead to a conclusion opposite that reached by the post-conviction court, the supreme court reversed the appellate court's grant of post conviction relief.[300]

K. Post-Conviction Relief

Several interesting developments have arisen this year regarding the procedures to be followed when a defendant pursues post-conviction relief. In *Howard v. State*,[301] the Indiana Supreme Court interpreted Indiana Rule of Post-Conviction Relief 2(1) as a remedy for belated *direct* appeals, rather than for belated appeals of other post-judgment petitions. Indiana Rule of Post-Conviction Relief 2 reads, "[w]here a defendant convicted after a trial or plea of guilty fails to file a timely praecipe, a petition for permission to file a belated praecipe for appeal of the conviction may be filed with the trial court . . . ."[302] The court determined that the 1994 amendment to the rule, which added the words "for appeal of the conviction," made it the vehicle for belated direct appeals, whereas the previous incarnation of Post-Conviction Relief 2 had allowed for belated appeals of other petitions including petitions for post-conviction relief under Post-Conviction Relief 1.[303] Because Howard attempted to initiate an untimely appeal of the denial of his petition for post-conviction relief rather than a

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295. *Id.* at 78.
296. *Id.* at 75.
297. *Id.* at 77.
298. *Id.*
299. *Id.* at 78.
300. *Id.* at 79.
301. 653 N.E.2d 1389 (Ind. 1995).
302. IND. R. POST CONVICTION RELIEF 2(1) (1996).
303. *Howard*, 653 N.E.2d at 1389.

conviction after a trial or a guilty plea, the supreme court affirmed the appellate court's denial of his petition for permission to file a belated praecipe pursuant to the rule.[304]

Another procedural development concerning petitions for post-conviction relief includes an opinion in which the Indiana Supreme Court determined that a petitioner may not use Indiana Trial Rule 60(B) to collaterally challenge his conviction while circumventing post-conviction procedures. In *Van Meter v. State,*[305] the court held that Van Meter could not use Trial Rule 60(B) to challenge his convictions of burglary, attempted theft, and an habitual offender adjudication because the Trial Rules applied only to civil cases.[306] Relying on the language of Indiana Rule of Post-Conviction Relief 1, the court noted that the Rule specifically precluded other previously available methods for challenging such convictions.[307] The post-conviction procedures required Van Meter to present his claim of newly discovered evidence by way of those rules.[308]

L. Equal Protection and Privileges and Immunities

In *American Legion Post #113 v. State,*[309] the American Legion challenged Indiana's anti-gambling statutes[310] as violative of the Privileges and Immunities Clause of the Indiana Constitution[311] and the Equal Protection Clause of the United States Constitution.[312] The appellate court determined that the challenged statutes were general prohibitions against gambling that did not differentiate among classes of persons, and that the legislature's authorization of certain types or "forms" of gambling, such as riverboat and pari-mutuel, did not create unlawful classifications of individuals; instead, they allowed all individuals to participate in those specific activities.[313] After applying the two-part standard of *Collins v. Day,*[314] the court found that the statutory authorization of the State Lottery Commission, which exempted it from prosecution, is reasonably related to the State's interest in maintaining integrity and control over gambling activities.[315] The statutory authorization of the State Lottery Commission was therefore

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304. *Id.* The reasoning of *Howard* has been recently applied in Bailey v. State, 653 N.E.2d 518 (Ind. Ct. App. 1995). The court of appeals held that the trial court correctly denied Bailey's petition for permission to file a belated praecipe to appeal the trial court's denial of his petition for post-conviction relief. *Id.*

305. 650 N.E.2d 1138 (Ind. 1995).

306. *Id.*

307. *Id.*

308. *Id.* at 1139.

309. 656 N.E.2d 1190 (Ind. Ct. App. 1995).

310. IND. CODE §§ 35-45-5-2, -3, -4 (1993).

311. IND. CONST. art. I, § 23.

312. U.S. CONST. amend XIV.

313. *American Legion*, 656 N.E.2d at 1193.

314. 644 N.E.2d 75 (Ind. 1995).

315. *American Legion*, 656 N.E.2d at 1193.

constitutional.[316]

As for the American Legion's fourteenth amendment rights to equal protection, the court applied a "rational basis" analysis determining that the "lottery exception" is rationally related to a legitimate government purpose, to wit: the State's interest in maintaining control over a generally illegal industry and in producing revenue that benefits the public welfare.[317] In addition, the appellate court upheld the statutes against a challenge to the State's police power, noting that the Indiana Supreme Court recognized that the State has a legitimate interest in protecting the health, safety and welfare of its citizens in relation to gambling activities through its exercise of its police power.[318]

316. *Id.*
317. *Id.* at 1194.
318. *Id.*

1995 SURVEY OF INDIANA EVIDENCE LAW

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INTRODUCTION

On January 1, 1994, the Indiana Supreme Court adopted the Indiana Rules of Evidence (IRE) which are similar to the Federal Rules of Evidence (FRE). The adoption of the IRE occurred following decisions by the Indiana Supreme Court demonstrating a shift towards the Federal Rules.[1]

The adoption of the Indiana Rules has resulted in a change for Indiana practitioners accustomed to following the common law evidentiary rules. The purpose of this Article is to serve as a guide through the IRE for the benefit of Indiana practitioners. As the rules and cases discussed below will show, not all of the rules have resulted in a drastic change in Indiana law.

I. ARTICLE I: GENERAL PROVISIONS

Article I contains provisions regarding the scope,[2] purpose and construction,[3] evidentiary rulings,[4] determination of preliminary questions,[5] limited admissibility,[6] and the issue of remainder of or related writing or recorded statements.[7] In general, these rules are consistent with prior Indiana law and practice, and are similar to their federal counterparts. However, unlike the Federal Rules, the Indiana Rules are a product of judicial action without legislative involvement.

The rules govern proceedings in the courts of the State of Indiana unless otherwise required by the United States Constitution, Indiana Constitution, or by the provisions of either Indiana Rule of Evidence 101 or other rules promulgated by the Indiana Supreme Court.[8] Only when the rules do not cover a specific evidence issue should common or statutory law apply.[9] The provisions of IRE 101(c) state that other than the rules regarding privileges, the rules of evidence do

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1. *See* Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992) (rejecting common law depraved sexual instinct rule and adopting FRE 404(b)). *See also* Modesitt v. State, 578 N.E.2d 649, 653-54 (Ind. 1991) (rejecting *Patterson* rule in favor of FRE 801(d)).
2. IND. R. EVID. 101.
3. IND. R. EVID. 102.
4. IND. R. EVID. 103.
5. IND. R. EVID. 104.
6. IND. R. EVID. 105.
7. IND. R. EVID. 106.
8. IND. R. EVID. 101(a).
9. *Id.*

not apply to "the determination of questions of fact preliminary to admissibility" under IRE 104(a), and the rules also do not apply to certain "miscellaneous proceedings."[10]

It is the responsibility of the party opposing the admission of evidence to raise a timely objection stating the specific ground for objection, unless such ground is apparent from the context.[11] Therefore, failure to timely raise the objection, may result in a waiver that does not preserve error for appeal.[12] Absent an appropriate objection, a court will only take notice of fundamental errors affecting the substantial rights of a party.[13] "Fundamental error is a substantial, blatant violation of basic principles of fairness which, if not corrected, would deny the defendant fundamental due process."[14]

If a court excludes the evidence, it is the proponent's duty to make known the substance of the evidence to the court by a proper offer of proof, unless such substance is apparent from the context within which the questions are asked.[15] When an offer of proof is made to the court in a jury trial, it must be done outside of the jury's presence, to the extent practicable, to prevent inadmissible evidence from being "suggested to the jury."[16]

Evidence can be admitted for a limited purpose.[17] It is the duty of the party desiring limited admissibility to request a limiting instruction from the court.

Since the adoption of the Indiana Rules of Evidence, there has been little case law on the rules contained in Article I. However, the Indiana Court of Appeals has confirmed that the rules do not apply to all court proceedings.[18]

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10. IND. R. EVID. 101(c)(2). Miscellaneous Proceedings include those proceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings.

11. IND. R. EVID. 103(a)(1).

12. The admission of testimony regarding a defendant's prior sexual misconduct was a violation of an order in limine. However, defense counsel's failure to lodge a contemporaneous objection to the evidence waived such error. Hackney v. State, 649 N.E.2d 690, 694 (Ind. Ct. App. 1995), *trans. denied*. *See also* Kimble v. State, 659 N.E.2d 182 (Ind. Ct. App. 1995), *trans. denied*.

13. IND. R. EVID. 103(d).

14. *Kimble*, 659 N.E.2d at 184 (citing Townsend v. State, 632 N.E.2d 727, 730 (Ind. 1994)).

15. IND. R. EVID. 103(a)(2).

16. IND. R. EVID. 103(c).

17. IND. R. EVID. 105.

18. A decision of a small claims court may be based solely upon hearsay evidence, including a small claims court's entry of a protective order. Rzeszutek v. Beck, 649 N.E.2d 673, 681 (Ind. Ct. App. 1995), *trans. denied*. The rationale behind this rule is clear: Litigants in small claims courts are often lay people with no legal training.

II. ARTICLE II: JUDICIAL NOTICE

IRE 201 permits a court to take judicial notice of facts[19] and law.[20] The court has the discretion to take judicial notice of a fact or law, whether requested by a party or not.[21] Unlike its federal counterpart,[22] IRE 201 is not limited in scope to adjudicative facts.[23] If a fact is "(1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,"[24] the fact must be judicially noticed.[25] However, as the Indiana Court of Appeals recognized in *Pigman v. Ameritech Publishing, Inc.*, "not every circumstance related to a case presents a fact requiring evidentiary proof or judicial notice."[26]

In *Pigman*, Ameritech challenged the court of appeals' earlier decision,[27] which held that Ameritech's Yellow Pages advertising contract was unconscionable and unenforceable. In reaching its decision, the court took judicial notice that in society the telephone "is ubiquitous and is the primary means of remote interactive communication."[28] Ameritech contended that the court had taken judicial notice of matters that were outside the record and denied it an opportunity to be heard, pursuant to IRE 201(e). The court noted that "[it] should exercise extreme caution in taking judicial notice of facts subject to proof."[29] However, this extreme caution did not preclude it from using its "everyday knowledge of facts in general" to arrive at its decision.[30]

In rejecting Ameritech's argument, the court of appeals noted that awareness of the telephone's place in society came from the court's life experience which "forms the background and frame of reference for every judicial opinion."[31] The frame of reference referred to in *Pigman* was not an adjudicative fact subject to evidentiary proof,[32] nor was it the type of judicial notice governed by IRE 201. Instead, the facts were legislative rather than adjudicative, and in using its

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19. IND. R. EVID. 201(a).
20. IND. R. EVID. 201(b).
21. IND. R. EVID. 201(c).
22. FED. R. EVID. 201.
23. This is not to suggest that federal courts are limited to judicial notice of adjudicative facts.
24. IND. R. EVID. 201(a).
25. The present value of $1 per year for a given number of years is a calculation capable of accurate and ready determination by resort to sources, such as the Burns interest tables, whose accuracy cannot reasonably be questioned and, therefore, it is not subject to reasonable dispute. Griffin v. Acker, 659 N.E.2d 659, 663-64 (Ind. Ct. App. 1995) (citing IND. R. EVID 201(d)).
26. Pigman v. Ameritech Publishing, Inc., 650 N.E.2d 67, 69 (Ind. Ct. App. 1995).
27. Pigman v. Ameritech Publishing, Inc., 641 N.E.2d 1029 (Ind. Ct. App. 1994).
28. *Pigman*, 650 N.E.2d at 69.
29. *Id.* (citation omitted).
30. *Id.*
31. *Id.* (citing Belcher v. Buesking, 371 N.E.2d 417, 420 (Ind. App. 1978)).
32. *Id.*

knowledge of those facts, the *Pigman* court was not subject to IRE 201.

Although IRE 201 requires a court to take judicial notice if requested by a party and supplied with the necessary information,[33] generally, a court may not take judicial notice of a different case, even if the case is before the same court and on a related subject between related parties.[34] In probation revocation matters, however, this rule has not been applied strictly.[35]

Although jurors in criminal actions are instructed that they may, but are not required to, accept as conclusive any judicially noticed fact,[36] IRE 201(g) requires that a civil jury be instructed to accept as conclusive any judicially noticed fact. This changes the discretion provided under prior Indiana law.

III. Article III: Presumptions in Civil Actions and Proceedings

According to IRE 301, "[a] presumption shall have continuing effect even though contrary evidence is received."[37] This rule probably changes prior Indiana law. Previously, a presumption disappeared when contrary evidence was received.[38] As it now stands, the rule likely means that the party who receives the benefit of a presumption will not be subject to a directed verdict. The presumption's continuing effect and the contrary evidence received will create an issue for the trier of fact.

IV. Article IV: Relevancy

"[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant evidence.[39] Relevant evidence is generally admissible; irrelevant evidence is inadmissible.[40] Trial courts are

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33. Ind. R. Evid. 201(d).

34. Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995).

35. *See* Henderson v. State, 544 N.E.2d 507, 512-13 (Ind. 1989); Szymenski v. State, 500 N.E.2d 213, 215 (Ind. Ct. App. 1986).

36. *See* Sturgis v. State, 654 N.E.2d 1150, 1153 (Ind. Ct. App. 1995) (error for the trial court to not instruct the jury that it may, but was not required to, accept as conclusive those sections of the Administrative Code judicially noticed, however, such error was harmless).

37. Ind. R. Evid. 301:

> In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

38. Gandy v. Orr, 44 N.E.2d 181 (Ind. App. 1942), *trans. denied.*

39. Ind. R. Evid. 401.

40. Ind. R. Evid. 402. *See* Bonner v. State, 650 N.E.2d 1139, 1141 (Ind. 1995) (content of an informant's statements and the propriety of police initiating an investigation were not probative

given wide latitude in ruling on the relevancy of evidence.[41] Relevant evidence, however, can be excluded if its probative value is substantially outweighed by unfair prejudice, issue confusion,[42] misleading the jury, undue delay, or needless presentation of cumulative evidence.[43] Trial courts are also given wide latitude in weighing the probative value of evidence against the possible prejudice of its admission.[44]

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of any contested issue and therefore irrelevant); Swain v. State, 647 N.E.2d 23, 25 (Ind. Ct. App. 1995), *trans. denied* ("why the police acted in a certain manner does not prove in any way that the defendant committed a certain crime"). Judge Chezem registered a strong dissent on the ground that by questioning the police officer's motive for the arrest, the defendant made the arrest an issue. *Id.* at 23 (Chezem, J., dissenting).

41. Bates v. State, 650 N.E.2d 754, 757 (Ind. Ct. App. 1995). Curiously, the court implies that admission of irrelevant evidence is per se an abuse of discretion. "[W]e review to determine whether the admission of certain evidence constituted an abuse of discretion *because the evidence was not relevant* to what the state was required to prove." *Id.* (emphasis added). This statement seems more in line with de novo review. The court did not seem to give any deference to the trial court's determination of relevancy.

Indiana appellate courts might consider rejecting the abuse of discretion standard for overturning a trial court's determination of relevancy. There really should be no discretion to admit irrelevant evidence. (Of course, the counterargument is that the determination of relevancy in close cases lies, to a certain degree, in an individual's everyday experience in how the world works.) Any admission of irrelevant evidence should then be reviewed according to whether any harm resulted from the admission.

42. *See* Griffin v. Acker, 659 N.E.2d 659, 663 (Ind. Ct. App. 1995) (The defendant's use of a 7.5% interest rate for thirty-year Treasury bills as a discount rate for present value purposes was a combination of the inflation rate and real interest rate, but the defendant did not distinguish between the two, and the trial court properly could have concluded that the danger of confusing such a rate on the present value issue substantially outweighed its probative value.).

43. IND. R. EVID. 403. *See Swain*, 647 N.E.2d at 25 (stating in dicta that the prejudice of a police officer testifying about the defendant's prior drug sales substantially outweighed the probative value of the officer explaining the next investigatory step taken by him).

44. Carson v. State, 659 N.E.2d 216, 218 (Ind. Ct. App. 1995). In Indiana, a threshhold question of the admissibility of prior bad acts evidence is whether a reasonable factfinder could find that the act(s) occurred and that the defendant committed the act(s). This is substantially similar to how the admissibility of this evidence would be treated under IRE 104(b). Sloan v. State, 654 N.E.2d 797, 800 (Ind. Ct. App. 1995). Once this question is decided in the affirmative, then the strength of that evidence should not be incorporated into the IRE 403 balancing test. The evidence's probative value is measured by what it can prove under IRE 404(b), not whether the underlying proof of the prior bad act is strong. The *Carson* court incorrectly incorporated the strength of the underlying evidence into the IRE 403 balancing test: "First of all, the evidence linking Carson to the crime [was] very tenuous . . . ." *Carson*, 659 N.E.2d at 219. IRE 104(e) allows parties to attack the strength of the underlying evidence. This should ordinarily provide adequate protection. If Indiana appellate courts are worried about the effect of prior bad acts evidence that just barely passes sufficiency review, then they could raise the threshhold standard of admissibility. A "clear and convincing" standard of admissibility would work. The solution is

A. Photographs and Videotapes

In *Butler v. State*, Butler argued on appeal that the trial court erroneously admitted photographs of two crime victims and a videotape of the crime scene when such evidence was irrelevant. According to Butler, his defense counsel made an offer to stipulate that Butler had killed the two victims with a knife and, further, counsel explained in opening statements that the two women had died as a result of Butler using a knife on them. Butler argued on appeal that because the cause of death of the victims was not at issue, the exhibits were irrelevant or, in the alternative, that any relevance was substantially outweighed by the danger of prejudice.

The Indiana Supreme Court held there was no error in the trial court's admission of photographs of the victims taken at the crime scene and at the morgue before autopsy, and in the admission of a videotape of the crime scene.[45] The court noted that the identity of the alleged victims and assailants, the injuries to the alleged victims and the source of such injuries, the death of the alleged victims and the cause of death, as well as the physical surroundings in which the injuries and deaths occurred, were all facts of consequence in the determination of guilt of an accused in a homicide case.[46] Distinguishing *Butler* from prior cases holding that gruesome photographic evidence was inadmissible,[47] the court found that the photographs in *Butler* correctly showed the victims' wounds, established the *corpus delicti*, and probably aided the jury in determining appellant's state of mind when he killed each of the two victims.[48] Additionally, the photographs did not show the bodies altered in any way by the doctor performing the autopsies.[49] Furthermore, the videotape showed the crime scene shortly after the police found the bodies and there was no claim that the video did not provide the jury with an accurate image of the crime scene at that time.[50] Therefore, the court held that the probative value of the photographs and videotape was not outweighed by their tendency to inflame the jury's emotions.[51]

B. Character Evidence: IRE 404

In general, character evidence is not admissible for the purpose of proving action in conformity therewith on a particular occasion.[52] However, there are two exceptions to this general rule. First, evidence of a pertinent trait of character

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not, however, to obfuscate the IRE 403 balancing test by introducing the strength of the underlying evidence into the inquiry.

45. Butler v. State, 647 N.E.2d 631, 633-34 (Ind. 1995).
46. *Id.* at 634.
47. *E.g.*, Kiefer v. State, 153 N.E.2d 899 (Ind. 1958).
48. *Butler*, 647 N.E.2d at 634.
49. *Id.* at 634-35.
50. *Id.* at 635.
51. *Id.*
52. IND. R. EVID. 404(a).

offered by the accused, or once offered by the accused, offered by the prosecution to rebut the same is permitted under IRE 404(a)(1).[53] Second, IRE 404(a)(2) permits evidence of a pertinent trait of character of the victim of the crime offered by an accused, or, once offered by an accused, by the prosecution to rebut the same, or evidence of a victim's character trait of peacefulness offered by the prosecution in a homicide case to rebut evidence presented by the accused that the victim was the first aggressor.

IRE 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,[54] intent,[55] preparation, plan,[56] knowledge,[57] identity, or absence of

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53. The defendant's prior arrest for disorderly conduct after the defendant wrestled with police, and his prior arrest for resisting law enforcement after he attempted to free his sister from a lawful arrest were relevant to defendant's peaceful nature. Therefore, under IRE 405(a) the State properly cross-examined defendant's character witnesses, who testified that the defendant had a reputation for peacefulness, about the witnesses' awareness of the defendant's prior arrests. The court, however, refused to distinguish between nonviolence and peacefulness in its determination of whether the State's cross-examination was proper. Forrest v. State, 655 N.E.2d 584, 587 n.2 (Ind. Ct. App. 1995), *trans. denied.*

54. *Id.* at 586-87 (evidence on the night of the murder that the defendant (1) smoked cocaine, (2) attempted to borrow money from victim to purchase more cocaine and was turned down, (3) tried to buy cocaine but had no money, and (4) was seen with cocaine after returning to the victim's home, was admissible to show defendant's motive to commit murder). *See also* Kimble v. State, 659 N.E.2d 182, 185 (Ind. 1995) (evidence that the defendant was a member of a racially biased group and testimony that defendant considered himself to be an "official" member of a racially biased group, because he committed a crime against the black race, was probative of the defendant's motive in committing the crime and was thus admissible under IRE 404(b)).

55. *See* Ely v. State, 655 N.E.2d 372, 375-76 (Ind. Ct. App. 1995); Christian-Hornaday v. State, 649 N.E.2d 669, 671 (Ind. Ct. App. 1995).

56. The common scheme or plan exception to the rule of inadmissibility of prior acts permits proof of identity by showing that the accused committed other crimes with identical modus operandi, and permits proof of an uncharged crime as evidence of a preconceived plan that included the charged crime. Sloan v. State, 654 N.E.2d 797, 801 (Ind. Ct. App. 1995), *trans. denied.* In *Sloan*, the court refers to IRE 404(b) exceptions. *Id.* at 800-01. In *Forrest*, the court correctly notes that under IRE 404(b) evidence of prior bad acts is generally admitted unless the evidence is offered solely to prove propensity. As a practical matter, the slight difference in approaches should make little difference, but IRE 404(b) should be viewed as a general rule of admissibility. The exception is when the evidence is offered solely to prove propensity. In that case, IRE 404(b) operates to exclude the evidence.

57. In Whitehair v. State, 654 N.E.2d 296 (Ind. Ct. App. 1995), stolen tires were found in the defendant's garage along with a stolen all-terrain vehicle. In the prosecution for receiving the stolen all-terrain vehicle, the defendant put his knowledge of the stolen character of the all-terrain vehicle at issue through his statements to police and defense counsel's opening statement at trial,

> mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.[58]

To be admissible, evidence of an accused's extraneous bad acts must: (1) be directed toward proving a matter in issue other than defendant's propensity to commit a crime; (2) show the prior act as similar enough and close enough in time to be relevant for reasons other than mere propensity;[59] (3) be such that a reasonable jury could find that act occurred and that the defendant committed the act;[60] and (4) be such that the evidence's probative value is not substantially outweighed by danger of unfair prejudice.[61]

Thus, the analysis of admissibility under IRE 404(b) necessarily incorporates the balancing test of IRE 403.[62] This balancing test must be utilized because evidence, although it has probative value, may unfairly affect the outcome of the trial and violate a defendant's constitutional due process right to a fair trial.[63] A threshhold requirement for admissibility of an extrinsic offense under IRE 404(b) requires the State to establish that the defendant committed the offense.[64] In *Carson v. State*, the court also evaluated the strength of the underlying evidence pursuant to the IRE 403 balancing test.[65]

The trial court in *Carson* permitted the State to introduce evidence of a drive-by shooting incident at the victim's mother's house that took place shortly after the shooting of the victim. The drive-by shooting also took place after the victim's mother passed on information to the police that the defendant had murdered her son. The defendant was arrested two days after the drive-by shooting. The defendant was with two other men at the time of his arrest. In the possession of the three men was a nine millimeter handgun and a shotgun. Ballistics tests linked these two guns to the drive-by shooting at the mother's house.

According to the State, the evidence of the drive-by shooting was admissible under the "motive" exception of IRE 404(b). The State justified the admission of this evidence as being probative of the defendant's motive and of consciousness

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therefore evidence of the stolen tires was relevant to the issue of the defendant's knowledge.

58. IND. R. EVID. 404(b).

59. Prior phone calls sufficiently similar to the calls for which the defendant was charged, and that occurred within one month of the charged conduct, were close enough in time to the charged conduct to be genuinely relevant. *Christian-Hornaday*, 649 N.E.2d at 672.

60. This is substantially equivalent to IRE 104(b).

61. Sloan v. State, 654 N.E.2d 797, 800 (Ind. Ct. App. 1995).

62. Carson v. State, 659 N.E.2d 216, 219 (Ind. Ct. App. 1995).

63. *Id.* at 218.

64. *Id.* The reason for this is obvious, if the defendant did not commit the offense, then the offense is irrelevant.

65. *Carson*, 659 N.E.2d at 218. *See supra* note 44 for a discussion of the correctness of this approach.

of guilt. The court of appeals rejected the motive justification, noting that the State is never required to prove motive.[66] Furthermore, the court noted the danger of a broad expansion of the motive exception to IRE 404(b).[67] The court also rejected the consciousness of guilt argument,[68] but did not categorically reject the possibility of its future use in another case.[69]

Even before the Indiana Supreme Court adopted the Indiana Rules of Evidence, Rule 404(b) has governed the admissibility of evidence of other crimes, wrongs, or acts since the 1992 opinion of *Lannan v. State*.[70] The *Lannan* court made it clear that it intended the "common scheme or plan" exception to the general rule to remain in place in addition to the exceptions[71] contained in FRE 404(b). Further, in *Moore v. State*[72] the Indiana Court of Appeals explained:

> Extrinsic evidence may properly be admitted under Evid. Rule 404(b) as per the common scheme or plan exception if it is admitted to either: (1) prove the identity of the perpetrator by showing that the defendant has committed other crimes with an identical *modus operandi*; or (2) as evidence of a preconceived plan which included the charged crime.[73]

Evidence offered to prove motive or purpose may also be probative of a common scheme or plan which ultimately is probative of identity.[74]

In *Moore*, during the trial against the defendant for criminal deviate sexual conduct, the State introduced evidence of an attack upon another woman that occurred eleven months after the attack of the victim for the original offense. Although the evidence was factually similar to the original offense, such evidence should not have been admitted under the "common scheme or plan" exception, or the identity exception to IRE 404(b), and it therefore constituted impermissible character evidence introduced for the purpose of showing the defendant acted in conformity with a particular trait.[75]

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66. *Carson*, 659 N.E.2d at 218.

67. *Id.* at 218-19 (citing Wickizer v. State, 626 N.E.2d 795, 797 (Ind. 1993)). *See also* Moore v. State, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995), *trans. denied* (court dubious of value of proving motive).

68. *Carson*, 659 N.E.2d at 219.

69. Because the court characterized the argument as "lack[ing] coherency," it seems likely that the court probably would not reject a consciousness of guilt argument if there were a better connection, e.g., a drive-by shooting at a complaining witness' house.

70. 600 N.E.2d 1334 (Ind. 1992).

71. The *Lannan* court spoke of FRE 404(b) exceptions. *Id.* at 1339 n.12. This was incorrect. FRE 404(b) is a general rule of admissibility, not a list of exceptions to a general rule of inadmissibility. The only exception in FRE 404(b) is that the evidence must not have the purpose of proving propensity. *See, e.g.*, United States v. Mendez-Ortiz, 810 F.2d 76 (6th Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

72. 653 N.E.2d 1010, 1015 (Ind. Ct. App. 1995).

73. *Id.* at 1016 (quoting Hardin v. State, 611 N.E.2d 123, 129 (Ind. 1993)).

74. *Id.*

75. *Id.* at 1018.

Reputation or opinion evidence may be used in all cases in which evidence of character or a trait of character is admissible.[76] When character or a trait of character of a person is an essential element of a charge, claim or defense, evidence of specific instances of the person's conduct can be used.[77] Evidence of a person's habit or of an organization's routine practice is admissible to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.[78]

C. Miscellaneous: Rules 407-412

Pursuant to IRE 407 through 412, certain evidence is not admissible to prove liability. Subsequent remedial measures—measures taken after an event which, if taken previously, would have made the event less likely to occur—are not admissible to prove negligence or culpable conduct in connection with the event.[79] Evidence of furnishing or offering to furnish a compromise, or of accepting or offering to accept valuable consideration in compromise or attempt to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.[80] Evidence of paying or offering to pay medical expenses occasioned by an injury or property damage is not admissible to prove liability for the injury or damages.[81] A withdrawn plea of guilty or admission of a charge, or of an offer so to plead, or of statements made in connection with a withdrawn plea or offer, is not admissible in any civil or criminal action against the person who made the plea or offer.[82] Evidence of

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76. IND. R. EVID. 405(a).

77. IND. R. EVID. 405(b).

78. IND. R. EVID. 406.

79. IND. R. EVID. 407. Such evidence is admissible, however, when offered for other purposes such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

80. IND. R. EVID. 408. Such evidence can be used to prove bias or prejudice of a witness, to negate a contention of undue delay, or to prove an effort to obstruct a criminal investigation or prosecution.

81. IND. R. EVID. 409.

82. IND. R. EVID. 410. Such a statement is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Although the language of IRE 410 does not contain the limiting language of FRE 410, which limits protection to statements made "in the course of plea discussions with an attorney for the prosecuting authority," IRE 410 retains the Indiana common law evidence rule providing that a defendant's statements made to a police officer who had no authority to enter into a binding plea agreement were not privileged plea negotiations and were, therefore, admissible. Gilliam v. State, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995), *trans. denied.* For a statement to qualify as a privileged communication, two requirements must be satisfied: (1) the defendant must have been charged with

insurance against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully.[83]

Finally, in a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except for evidence of the victim's or witness' past sexual conduct with the defendant, evidence showing that some person other than the defendant committed the act upon which the prosecution is founded, evidence that the victim's pregnancy at the time of trial was not caused by the defendant, or evidence of conviction for a crime to impeach a witness under IRE 609.[84] There is no exception to the rape shield statute to allow for the admission of the victim's past sexual conduct for the independent purpose of showing the defendant's belief as to the victim's age.[85]

V. PRIVILEGES

The general rule regarding privileges is that no person has the privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness, disclosing any matter, or producing any object or writing.[86] This general rule is, however, subject to exceptions found in the Constitution, statutes, other rules promulgated by the Indiana Supreme Court, or principles of common law.[87] Some of these privileges include the attorney-client privilege, which applies to all communications between the client and attorney for purposes of obtaining professional legal advice regarding the client's rights and liabilities,[88] the physician-patient privilege, which protects communications that are "necessary to treatment or diagnosis looking toward treatment,"[89] the social worker-patient privilege,[90] and the privilege against

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a crime at the time of the statement; and (2) the statement must have been made to someone with authority to enter into a binding plea agreement. *Id.* Although IRE 410 "provides no test for determining whether a statement was made 'in connection with' a plea offer, [pursuant to the common law of Indiana, to qualify as a privileged communication], the communication must have as its ultimate purpose the reduction of punishment or other favorable treatment from the state to the defendant." *Id.* (quoting Crandell v. State, 490 N.E.2d 377, 380 (Ind. Ct. App. 1986), *trans. denied*).

83. IND. R. EVID. 411. Such evidence can be used to prove agency, ownership or control, or bias or prejudice of a witness.

84. IND. R. EVID. 412(a).

85. Little v. State, 650 N.E.2d 343, 344-45 (Ind. Ct. App. 1995).

86. IND. R. EVID. 501(a).

87. *Id.*

88. IND. CODE § 34-1-14-5(2) (Supp. 1995); Corll v. Edward D. Jones & Co., 646 N.E.2d 721, 725-26 (Ind. Ct. App. 1995).

89. IND. CODE § 34-1-14-5(3) (Supp. 1995); Thomas v. State, 656 N.E.2d 819, 822 (Ind. Ct. App. 1995).

90. Stone v. Daviess County Div. of Children & Family Servs., 656 N.E.2d 824, 831 (Ind. Ct. App. 1995), *trans. denied*.

self-incrimination.[91]

Even though a privilege may exist to protect a witness from testifying, the privileges can be waived if the privileged communication is revealed to a third person,[92] or if the privilege is not asserted by objection. Furthermore, limits and exceptions can be placed on privileges. For example, the privilege against self-incrimination is not absolute, but is to be balanced with the government's legitimate demands to compel citizens to testify in order to ascertain the truth surrounding a criminal incident.[93] Also, the social worker-patient privilege, like the physician-patient privilege, is abrogated in proceedings for involuntary termination of the parent-child relationship.[94]

VI. ARTICLE VI—WITNESSES

Article VI concerns the testimony of a lay witness. Under IRE 601, every person is presumed competent except as provided in the IRE[95] or as provided by any legislative act.[96] The question of witness competency is determined by the trial court and reviewed on an abuse of discretion standard.[97] A competent witness cannot be excluded from testifying,[98] although the witness' testimony can be excluded if it violates another rule of admissibility.[99]

In addition, a competent witness' credibility may be attacked by any party to

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91. *In re* Steelman, 648 N.E.2d 366, 369 (Ind. Ct. App. 1995) (citing U.S. CONST. amend. V; IND. CODE § 35-37-3-3(a) (1993)).

92. *Thomas*, 656 N.E.2d at 823.

93. *In re Steelman*, 648 N.E.2d at 369 (citing *In re* Caito, 459 N.E.2d 1179 (Ind. 1984)). However, if the state forces a person to testify about a crime, it must provide a "grant of immunity [that will] leave the witness in substantially the same position as if the privilege to remain silent had been properly exercised." *Id.*

94. *Stone*, 656 N.E.2d at 831; *see also* IND. CODE §§ 25-23.6-6-1, 31-6-5-1, 31-6-5-13(d) (1993).

95. *See* IND. R. EVID. 602 (witness without personal knowledge of a matter is incompetent to testify; no personal knowledge if the matter occurs only during or after hypnosis); IND. R. EVID. 605 (presiding judge incompetent to testify); IND. R. EVID. 606 (juror may not testify before jury in which she is sitting).

96. *See also* IND. CODE § 34-1-14-4 (1993) (providing that all persons are competent witnesses in a civil action or proceeding, whether parties to, or interested in, the suit, except as provided by statute); Thornton v. State, 653 N.E.2d 493, 497 (Ind. Ct. App. 1995) (witnesses presumed competent).

97. *Thornton*, 653 N.E.2d at 497 (citing Hughes v. State, 546 N.E.2d 1203, 1204 (Ind. 1989)).

98. The trial court lacks discretion in this area. White v. White, 655 N.E.2d 523, 524 (Ind. Ct. App. 1995).

99. *Id.* at 529 n.11 (exclusion of a witness and exclusion of certain evidence from a witness are two different things, but competent witness' testimony may be excluded under IRE 403 if the probative value of the evidence is outweighed by the testimony's prejudicial impact).

the proceeding.[100] IRE 608, 609, 613 and 616 provide specific modes of attacking a witness' credibility. IRE 608 allows a party to attack a witness' credibility by evidence either in the form of opinion or reputation[101] or specific instances of conduct.[102] Furthermore, IRE 609 permits a party to attack a witness' credibility by the introduction of evidence concerning the witness' conviction of certain crimes.[103] Finally, IRE 613 permits a witness' credibility to be attacked through the use of a witness' prior inconsistent statements,[104] and IRE 616 permits a party to attack a witness' credibility by introducing evidence of bias, prejudice, or interest of the witness.[105]

Article VI also addresses the general treatment of witnesses. IRE 611 and 614 address the interrogation of witnesses both on direct and cross-examination and the interrogation of witnesses by the court and jury. IRE 612 allows a party to refresh a witness' recollection by examining a writing or object either before or during testifying.[106] Finally, IRE 615 mandates the separation of witnesses at the request of any party to the litigation.[107]

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100. IND. R. EVID. 607.

101. IND. R. EVID. 608(b). The credibility of a witness may be attacked or supported subject to two limitations: (1) the evidence may only refer to character for truthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

102. *Id.* A witness' credibility may be attacked or supported on cross-examination by an inquiry into specific instances of conduct, other than a conviction of a crime as provided by IRE 609, subject to the court's discretion.

103. IRE 609 permits a party to attack a witness' credibility with the witness' prior convictions. In Davis v. State, 654 N.E.2d 859 (Ind. Ct. App. 1995), the court held it was not error to allow the introduction of evidence of the defendant's prior burglary conviction under IRE 609 even though defendant was on trial for burglary. The defendant wanted to only allow the jury to hear that he had been convicted of an unnamed felony. This would allow the jury to speculate and call into question the witness' veracity based on any criminal conviction. This type of inference is prohibited by IRE 609. *Id.* at 860. The court did not note that the plain language of the rule suggests that the trial court *must* admit evidence of a prior conviction for one of the enumerated crimes when it is proffered.

104. IND. R. EVID. 613. The witness need not be shown the statement before being examined, although the statement shall be disclosed to opposing counsel. IND. R. EVID. 613(a). In addition, extrinsic evidence of a prior inconsistent statement of a non-party witness is not generally admissible to impeach a witness unless the witness has the opportunity to explain or deny the statement and the opposing party has an opportunity to interrogate the witness regarding the same. IND. R. EVID. 613(b).

105. The Federal Rules have no counterpart to IRE 616.

106. If a witness' memory is refreshed while the witness is testifying, the opposing party is entitled to have the writing or object produced at trial or other processing. IND. R. EVID. 612(a). If the witness' memory is refreshed prior to testifying, the court may allow the opposing party to obtain the writing or object if the court determines that the interests of justice so require. IND. R. EVID. 612(b).

107. The rule does not require the exclusion of a party, a party's representative or a party

A. IRE 601—General Rule of Competency

White v. White[108] is an important case for the domestic law practitioner. In this case, the court of appeals confronted the issue of whether the exclusion of the testimony of a ten year-old child in a dissolution hearing was proper. In *White*, the wife attempted to call her ten year-old son to rebut previous testimony presented by her husband. Her husband's witnesses previously testified that they had seen the wife display hostility towards the son and that the wife had actually kicked him on occasion. The son's counsel objected to allowing the son to testify, and the court sustained the objection stating, in part:

> It is the position of this Court and has been the position of this Court . . . that children of the parties are not to be called as witnesses. I will allow children of the parties to be called as witnesses if the issue is emancipation for the limited purpose of them testifying as to whether they meet the qualifications of the statute. I will allow children of the parties to be called as witnesses for the limited purpose of them testifying as to advanced educational expenses. . . . I think that it is abundantly clear, based on [Indiana Code section 31-1-11.5-21(d)] and based on case law, that it is within this Court's discretion to exclude children as witnesses.[109]

The court of appeals held that the exclusion of the rebuttal testimony was error.[110]

The court reasoned that section 31-1-11.5-21(d) of the Indiana Code did not permit a judge to exclude a minor child from testifying at trial.[111] The Court further reasoned that the IRE permit a party to call and obtain relevant testimony from any competent witness and that the trial court lacks discretion to accept or reject those witnesses.[112] However, the acceptance of a competent witness does not necessarily require the court to accept all of the witness' testimony. The trial court may still preclude testimony if it determines that the testimony violates another evidentiary or procedural rule.[113]

B. IRE 608—Evidence of Character and Conduct of a Witness and IRE 609—Impeachment by Evidence of a Conviction of a Crime

As discussed above, a witness' credibility may be attacked under certain

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essential to the presentation of the party's cause. IND. R. EVID. 615.

108. 655 N.E.2d 523 (Ind. Ct. App. 1995).

109. *Id.* at 526.

110. The court noted that two pieces of evidence were offered with the son's testimony: (1) the proper rebuttal testimony regarding whether the wife had kicked the son; and (2) the improper rebuttal evidence regarding the son's custody desires, the latter of which should have been offered in the wife's case in chief. *Id.* at 527.

111. *Id.* at 528.

112. *Id.* at 529.

113. *Id.* at 531. The trial court was within its discretion to preclude testimony of the minor child that should have been properly offered during the wife's case-in-chief.

circumstances by opinion, reputation or specific instances of conduct,[114] or by evidence of a conviction of a crime.[115] In *Palmer v. State*,[116] the court addressed both types of credibility attacks under IRE 608 and 609. In *Palmer*, the defendant attempted to admit evidence of one of the undercover police officer's drug use and related suspension. The State filed a motion in limine to exclude this evidence which the trial court granted. On appeal, the court upheld the exclusion of the evidence because the proffered evidence did not fit under either IRE 608 or 609.[117] The court reasoned that the drug use evidence did not constitute an opinion of the officer's reputation under IRE 608(a) and that the drug related suspension did not constitute a crime under IRE 609.[118] Finally, the court noted that a witness could not be impeached by specific acts of misconduct that had not resulted in criminal convictions.[119]

C. IRE 611—Mode and Order of Interrogations and Presentations

Generally, under IRE 611(b), the scope of cross-examination is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness." However, a party's direct examination of a witness may open the door to additional cross-examination that otherwise may not have been permissible. For example, in *Reeves v. Boyd & Sons, Inc.*,[120] the court upheld the trial court's allowance of a party to question the defendant over the defendant's objection under IRE 404(b) about a prior conviction for driving under the influence of alcohol. The trial court allowed the examination because the defendant's witnesses had opened the door by giving rise to an inference that the defendant did not partake of alcoholic beverages and thus would not have been intoxicated at the time of the collision. Therefore, the court held that even though the plaintiff could not have otherwise questioned the defendant regarding the prior conviction, the defendant's witnesses had opened the door to such questions through their testimony, and such questioning was proper.[121]

D. IRE 615—Separation of Witnesses

This rule has not altered prior case law holding that a court may disqualify a witness for violating a separation of witnesses order if the violation was caused by the connivance or fault of the party calling the witness.[122] However, IRE 615 has

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114. IND. R. EVID. 608.

115. IND. R. EVID. 609.

116. 654 N.E.2d 844 (Ind. Ct. App. 1995).

117. *Id.* at 848.

118. *Id.* However, the court did note that evidence of drug use could be offered if the witness was under the influence of drugs either at the time of trial or at the time of the occurrence or that the officer's ability to perceive, remember or testify was substantially affected by the drug use. *Id.*

119. *Id.* (citing Hicks v. State, 544 N.E.2d 500 (Ind. 1989)).

120. 654 N.E.2d 864 (Ind. Ct. App. 1995), *trans. denied.*

121. *Id.* at 872.

122. Smiley v. State, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995), *trans. denied.*

changed prior case law in that a motion to separate is no longer subject to the discretion of the court, but mandatory upon any party's request.[123]

VII. ARTICLE VII—OPINION TESTIMONY AND THE USE OF EXPERTS

Under Article VII, witnesses may testify as to their opinions concerning any issue in question. IRE 701 allows lay witnesses to testify as to their opinions if those opinions are "rationally based on the perception of the witness" or "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." More broadly, IRE 702 provides that expert witnesses [124] may testify in the form of opinion or otherwise where their testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.[125] This expert opinion may be based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field,[126] and may embrace an ultimate issue to be decided by the trier of fact.[127] However, the expert witness' scientific testimony "is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests is reliable."[128]

A. Rule 702—Testimony by Experts

Steward v. State[129] addressed the additional requirements of IRE 702(b). In *Steward*, the defendant was convicted of two counts child molesting. At trial, the State presented evidence that one of the victim's behavior was consistent with that of other victims of child sexual abuse. The State presented such evidence

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123. IND. R. EVID. 615. *But see* Miller v. State, 648 N.E.2d 1208, 1211 (Ind. Ct. App. 1995), *trans. denied* (discussing discretion of trial court in granting motion to separate witnesses). *See also* Fourthman v. State, 658 N.E.2d 88, 90 (Ind. Ct. App. 1995), *trans. denied* (trial court is required by rule to grant a party's motion to separate with the exception of certain witnesses identified by the rule). *Fourthman* is the correct view.

124. An expert is defined as one qualified "by knowledge, skill, experience, training or education." IND. R. EVID. 702.

125. Whether expert witnesses are required first to disclose the underlying facts or data giving rise to their opinions prior to testifying is in the discretion of the court. However, expert witnesses are required to disclose such information on cross-examination. IND. R. EVID. 705.

126. IND. R. EVID. 703. *See also* Fleener v. State, 648 N.E.2d 652, 659 (Ind. Ct. App. 1995), *aff'd*, 656 N.E.2d 1140 (Ind. 1995) (testimony from practicing psychologist that exhibit was a reprint from the *Diagnostic and Statistic Manual* and that manual was used by both her and by others in her field satisfied the evidentiary foundational requirement of IND. R. EVID. 703).

127. IND. R. EVID. 704. However, IRE 704(b) precludes witnesses from testifying as to their opinions regarding "intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

128. IND. R. EVID. 702(b). FRE 702 does not have the explicit requirement, but as the Supreme Court noted in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), FRE 104(a) requires that in order for a court to admit scientific evidence under FRE 702, it must be satisfied of the reliability of such evidence. *Id.* at 592 n.10.

129. 652 N.E.2d 490 (Ind. 1995).

expressly for the purpose of proving that the alleged sexual contact occurred. Over the defendant's objection, the State's expert witnesses testified generally about child sexual abuse accommodation syndrome (CSAAS) and that the victim's behavior was consistent with the syndrome. The defendant objected to the CSAAS testimony on the ground that the testimony was not based on reliable scientific principles and therefore was not admissible under IRE 702(b).

At the outset, the court noted that "[t]he admissibility of expert testimony regarding [CSAAS] evidence is controversial and has received substantial criticism."[130] The court then examined an extensive amount of studies and recognized that "[b]ecause children's responses to sexual abuse vary widely, and because many of the characteristics identified by [CSAAS], or by similar victim behavior groupings, may result from causes unrelated to abuse, diagnostic use of syndrome evidence in courtrooms poses serious accuracy problems."[131] Thus, the court held that CSAAS testimony was not scientifically reliable to satisfy IRE 702(b),[132] and therefore, was not admissible.[133]

The importance of *Steward* lies predominantly in the court's discussion of the trial court's function in determining the reliability of proffered expert testimony. As in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[134] the *Steward* court recognized the trial court's role as the gatekeeper of the admission of expert testimony. The court stated that the trial court's determination of "reliability may be established either by judicial notice or, in its absence, by the proponent of the scientific testimony providing sufficient foundation to convince the trial court that the relevant scientific principles are reliable."[135] Thus, upon a finding by the trial court that the expert testimony will assist the trier of fact[136] and is sufficiently reliable, the expert testimony may be admitted.[137]

Another important point made by the *Steward* court relates, as the *Daubert* Court noted, to the expert testimony's "fit." As noted by the Court, "scientific validity for one purpose is not necessarily scientific validity for other, unrelated

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130. *Id.* at 492.

131. *Id.* at 493.

132. The court reaffirmed this holding in Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995).

133. *Steward*, 652 N.E.2d at 499. The court did note, however, that "[i]t is possible that foundational support may be discovered in the future which will expand the purposes for which such expert testimony may be deemed reliable." *Id.*

134. 509 U.S. 579 (1993).

135. *Steward*, 652 N.E.2d at 499.

136. IND. R. EVID. 702(a). *See also* Vega v. State, 656 N.E.2d 497, 503 (Ind. Ct. App. 1995), *trans. denied* (court upheld a trial court's exclusion of expert testimony concerning memory on the ground that it would not assist the trier of fact).

137. *Steward*, 652 N.E.2d at 499. In addition, however, the trial court must also be mindful of IRE 403's balancing test, which precludes admission of evidence where its probative value is substantially outweighed by the danger of unfair prejudice. Justice Sullivan noted in his dissent in *Steward* that it is under IRE 403 that "the real battle over the admissibility of [CSAAS] should be fought in most cases." *Id.* at 501 (Sullivan, J., dissenting).

purposes."[138] Rather, the rule "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[139] In *Steward*, the valid connection might occur where the victim's credibility was attacked. Under such a circumstance, expert testimony might be appropriate where CSAAS testimony could be offered to explain the victim's behavior patterns, even though it was not admissible to prove that the sexual contact occurred.[140]

B. Rule 704(b)—Legal Conclusions

As noted above, IRE 704(b) prevents any witness, lay or expert, from testifying as to legal conclusions. The court of appeals addressed this rule in *In re Annexation Proposed by Ordinance No. X-01-93*.[141] In this case, a witness was offered to testify about a chain of title for a particular piece of property. The court noted that the results of a chain of title search are not legal conclusions, but rather the results of the search. If the title search reveals a specific encumbrance, the encumbrance is in the chain of title and the witness can testify as to the encumbrance. Thus, the court held that the results of a chain of title search are not legal conclusions necessitating a court's determination and are not precluded by IRE 704(b).[142]

VIII. ARTICLE VIII—HEARSAY AND THE EXCEPTIONS

Article VIII of the IRE discusses hearsay and the myriad exceptions to the general rule of non-admissibility.[143] IRE 801 defines hearsay as "a statement,[144] other than one made by the declarant[145] while testifying at the trial or hearing, offered to prove the truth of the matter asserted." However, two categories of statements are defined as nonhearsay under the rules—certain types of prior statements by a witness[146] and statements by a party-opponent.[147] They may be

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138. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993).

139. *Steward*, 652 N.E.2d at 498 (citation omitted). The *Daubert* Court used the following example of the study of the moon to illustrate "fit." The Court noted that the study of the phases of the moon may provide valid scientific knowledge about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact and will "fit." However, the testimony will not "fit" if evidence that the moon was full on a certain night is offered to show that an individual was unusually likely to have behaved irrationally on that night. *Daubert*, 509 U.S. at 591.

140. *Steward*, 652 N.E.2d at 499. Although not discussing the use of the testimony in terms of "fit," the use of the CSAAS testimony would "fit" where the victim's credibility was attacked.

141. 654 N.E.2d 284 (Ind. Ct. App. 1995), *trans. denied.*

142. *Id.* at 288.

143. IRE 802 provides that "[h]earsay is not admissible except as provided by law or by these rules."

144. A "statement" is an oral or written assertion or nonverbal conduct of a person intended by the person as an assertion. IND. R. EVID. 801(a).

145. The declarant is the person who makes the statement. IND. R. EVID. 801(b).

146. IND. R. EVID. 801(d)(1). The statement is not hearsay if the declarant testifies at a

offered for any purpose.

Two categories of hearsay exceptions are provided in Article VIII. IRE 803 provides twenty-three exceptions to the hearsay rule where the availability of the declarant is immaterial.[148] IRE 804 provides four (4) exceptions to the hearsay rule where the declarant is unavailable.[149] Finally, where hearsay is included within hearsay, the hearsay statement is admissible if each part of the combined statement is admissible under an exception as provided in IRE 803 and 804.[150]

A. Rule 801—Definitions

Several recent Indiana cases have addressed the definitional aspects of hearsay. As discussed above, hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement.[151] Conversely, where the statement is not offered for the truth of the matter asserted, it is not hearsay and is admissible for other purposes.

Whited v. State contains a good example of a statement, where, if offered for the truth of the matter asserted, it would be inadmissible hearsay, but where

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hearing or a trial, is subject to cross examination concerning the statement, and the statement is either (1) inconsistent with the declarant's testimony at trial and was given under oath, or (2) consistent with the declarant's statement and used to rebut a charge against the declarant of recent fabrication, improper influence, or motive, so long as the prior statement was made before the motive to fabricate arose, or (3) is one of identification of a person made shortly after perceiving the person.

147. IND. R. EVID. 801(d)(2). A party-opponent's statement is not hearsay if it is offered against that party and is either: (1) the party's own statement; (2) a statement adopted by a party; (3) a statement by a person authorized by the party to make such a statement; (4) a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment and made during the relationship; or (5) a statement of a co-conspirator made during the course and in furtherance of the conspiracy. *See, e.g.*, Carmichael v. Kroger Co., 654 N.E.2d 1188, 1189-90 (Ind. Ct. App. 1995), *trans. denied* (claim form signed by plaintiff held not hearsay, but a statement of a party opponent and thus admissible under IRE 801(d)(2)(A) or (C)).

148. See IND. R. EVID. 803(1)-(23) for a complete listing of the exceptions.

149. A declarant is generally unavailable if she cannot testify or refuses to testify for any reason. However, a declarant is not unavailable as a witness if the declarant's refusal to testify is due to the wrongdoing of the proponent of the statement for the purpose of preventing the witness from testifying. IND. R. EVID. 801(a). *See also* Kellems v. State, 651 N.E.2d 326, 329 (Ind. Ct. App. 1995) (declarant is unavailable for purposes of this rule if he invokes the protections of the Fifth Amendment).

150. IND. R. EVID. 805.

151. *See* Matusky v. Sheffield Square Apartments, 654 N.E.2d 740, 741-42 (Ind. 1995) (affidavit of landlord's employee attesting that the notice that was sent to the tenant's within statutory period was hearsay, but admissible in a small claims proceeding); Whited v. State, 645 N.E.2d 1138, 1140 (Ind. Ct. App. 1995); *see also* Rzeszutek v. Beck, 649 N.E.2d 673 (Ind. Ct. App. 1995).

offered to show the effect the statement had on the hearer, it is not hearsay.[152] In *Whited*, the defendant attempted to offer out of court statements made by the victim. The victim allegedly told the defendant soon after they first met that she did not have a boyfriend. The defendant argued that these statements caused him to believe she had consented to sex. The trial court excluded the statements on the grounds they were hearsay.

The court of appeals held that the trial court erred in excluding the statements.[153] The court reasoned that the statements were being used to attempt to prove the effect they had on the defendant. The statements were not being offered to prove the truth of the statements, i.e., whether the victim actually had a boyfriend. Because they were not offered to prove the truth of the matter asserted, the court correctly found that the statements were not hearsay, and that the trial court erred in excluding the testimony.[154]

Hilton v. State[155] discusses: (1) the requirements to preserve alleged error where the trial court excludes evidence of a prior inconsistent statement; and (2) the foundational requirements to admit a prior inconsistent statement.[156] In *Hilton*, the defendant attempted to call a witness to testify about another witness' prior inconsistent statement.[157] The trial court excluded the testimony on the grounds that the defendant failed to establish a proper foundation for the testimony and that the statements were hearsay. The trial court reasoned that the foundation for the testimony was lacking because the defendant had failed to cross-examine the available declarant concerning the statement as required by IRE 801(d)(1)(A).

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152. *See also* Fleener v. State, 648 N.E.2d 652, 656 (Ind. Ct. App. 1995), *aff'd*, 656 N.E.2d 1140 (Ind. 1995) (child molestation victim's mother's testimony that abuse precipitated divorce from defendant was not hearsay because it was not offered to prove the truth of the matter asserted, but rather to explain why the marriage to the defendant had ended).

153. *Whited*, 645 N.E.2d at 1140.

154. *Id.* However, the court held the exclusion of the testimony was harmless error and upheld the defendant's conviction for rape and criminal confinement. *Id.*

155. 648 N.E.2d 361 (Ind. 1995).

156. Some prior inconsistent statements are defined as nonhearsay under IRE 801(d)(1)(A).

157. The court confuses the different requirements of and effects of nonhearsay evidence admitted under IRE 613(b) as opposed to IRE 801(d). "Statements admitted for this purpose are not hearsay. *Evid. R. 801(d).*" *Hilton*, 648 N.E.2d at 362 (emphasis added). IRE 801(d) has absolutely nothing to do with whether prior inconsistent statements are admissible under IRE 613(b). Prior inconsistent statements offered to impeach a witness' credibility are not hearsay because they are not offered to prove the truth of the matter asserted; they are offered to impeach. Therefore, they do not need to be defined as nonhearsay by IRE 801(d) to be admissible. Statements admitted under IRE 613(b) cannot be used to prove the truth of the matter asserted. Prior inconsistent statements admitted under IRE 801(d) of course may be used for impeachment, but they may also be used to prove the truth of the matter asserted. Prior inconsistent statements admitted under IRE 613(b) do not have to meet the predicate requirements of IRE 801(d), i.e., "given under oath subject to the penalty of perjury, hearing or other proceeding, or in a deposition . . . ." Introducing IRE 801(d) into the inquiry of whether the evidence of the prior inconsistent statements was admissible under IRE 613(b) was incorrect.

The supreme court agreed that the defendant failed to establish the proper foundation for the testimony.[158]

In addition to discussing the foundational requirements, the court also noted that the defendant had failed to make an adequate offer of proof concerning the proffered testimony, and thus, the defendant had waived the issue. The court stated: "An offer of proof must be certain and must definitely state the facts sought to be proved, and must show the materiality, competency, and relevancy of the evidence offered."[159] The court found the defendant's offer of proof defective in that it lacked specificity and failed to establish such material facts as when the conversation took place, and who was present at the time.[160] Additionally, the court reasoned that a phrase such as "I believe" did not adequately assure the court that the offer represented the substance of the declarant's testimony.[161] Thus, the court held that the defendant waived the issue by failing to make an adequate offer of proof.

B. Rule 803—Hearsay Exceptions—Availability of Declarant Immaterial

IRE 803 provides twenty-three exceptions to the hearsay rule. Under IRE 803, the availability of the declarant is immaterial. Numerous cases have addressed many of the exceptions under IRE 803. This subpart will provide a brief overview of many of these cases.

1. Rule 803(4)—Statements for Purposes of Medical Diagnoses or Treatment.—Under IRE 803(4), statements which are made for the purposes of, and reasonably pertinent to, medical diagnoses or treatment[162] are admissible even though they are hearsay statements. It is important to remember that the statements need not be solely related to how the individual feels, but can also be related to the cause of the injury. A good example of such statements can be found in *Thomas v. State*.[163]

In *Thomas*, the defendant was convicted of aggravated battery against his wife. Apparently after becoming embroiled in an argument in their car while at a gas station, the defendant struck his wife in the face and bit her on the face, eyes and arms. As a result of the bites to the eye, the wife's eye was surgically removed. At trial, the State offered the wife's doctor's testimony concerning the injured eye. The doctor testified that the wife told him during his initial evaluation that she had been in a fight with a "significant other" and the fight included biting. The doctor also testified that ascertaining the cause of the injury was important in treating the patient. The defendant objected to this testimony on the grounds of

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158. *Hilton*, 648 N.E.2d at 362.

159. *Id.* (citing Tope v. State, 362 N.E.2d 137 (Ind. 1960)).

160. *Id.*

161. *Id.*

162. The statements need not be made to a physician to be admissible where the declarant subjectively believes the statement is being made in contemplation of receiving medical diagnosis or treatment. Fleener v. State, 648 N.E.2d 652, 658 (Ind. Ct. App. 1995).

163. 656 N.E.2d 819 (Ind. Ct. App. 1995).

hearsay. The trial court overruled the objection and the appellate court upheld the trial court's ruling. The court held that the statements made to the doctor were made for the purpose of diagnosing and treating her injured eye and were therefore admissible under IRE 803(4).[164]

2. Rule 803(6)—Business Records Exception.—Under the business records exception, a document made at or near the time, by a person with knowledge,[165] regularly kept in the course of the conducted business activity is admissible. The foundation for the admission of a business record need not be made by the person who created the business record, but need only be made by testimony of any person who possesses a functional understanding of the record-keeping process.[166] Once the foundation has been established, the business record may be admitted for any permissible purpose.

One interesting case discussing the business record exception is *Humbert v. Smith*.[167] In *Humbert*, Smith gave birth to a child and filed a paternity action against Humbert, alleging that Humbert was the child's natural father. During the possible period of conception, however, Smith had sexual relations with three different men, including Humbert. Blood tests were administered to all three men. The blood test showed a 99.97% probability that Humbert was the child's father and excluded the other two men. The test results were admitted under section 31-6-6.1-8(b) of the Indiana Code over the defendant's objection that Smith did not establish a proper foundation as required by IRE 803(6). Section 31-6-6.1-8(b) provides that blood or genetic test results are admissible without establishing a foundation regarding the accuracy of the results, unless the objecting party files a written objection thirty days before the hearing.

The court of appeals recognized that a conflict existed between the statute and IRE 803(6). The court noted that "in the event of a conflict between a procedural statute and a procedural rule adopted by the supreme court, the latter shall take precedence."[168] Furthermore, the court reasoned, where a conflict exists, the rules of procedure govern and the phrases that are contrary to the rules of procedure are considered a nullity.[169] Thus, the court held that the statute was void to the extent it conflicted with IRE 803(6), and IRE 803 controlled the report's admission.[170]

3. Rule 803(8)—Public Records and Reports.—Under IRE 803(8), records or reports of a public office or agency made or kept pursuant to a duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law are admissible unless

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164. *Id.* at 823.

165. *See, e.g.*, D.W.S. v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995) (parts of reports were not admissible under hearsay exception because evidence did not establish that the preparers had first-hand knowledge of the incidents reported).

166. Payne v. State, 658 N.E.2d 635, 645 (Ind. Ct. App. 1995), *trans. denied.*

167. 655 N.E.2d 602 (Ind. Ct. App. 1995), *aff'd*, 664 N.E.2d 356 (Ind. 1996).

168. *Id.* at 604 (citations omitted).

169. *Id.* at 605 (citations omitted).

170. *Id.* However, the court found the admission of the report to be harmless error and affirmed the trial court's finding of paternity.

the sources of information indicate a lack of trustworthiness. Like IRE 803(6), the reports must be made by a person with first-hand knowledge.[171] These admissible records, however, do not include: (1) police or law enforcement investigative reports; (2) investigative reports prepared by or for a government or agency when offered by a government or agency; (3) factual findings offered by the government in criminal cases; and (4) factual findings resulting from special investigation of a particular complaint, except when offered by the accused in a criminal case.[172] One example of these admissible public records is a Bureau of Motor Vehicles report.[173]

A case that discussed the applicability of IRE 803(8), and the distinction between an "observation" and a "factual finding" is *Kindel v. State*.[174] In *Kindel*, the defendant was arrested as an habitual traffic offender. After a bench trial, the defendant was convicted of operating a motor vehicle while his driving privileges were suspended. Kindel appealed the conviction and argued that the Bureau of Motor Vehicles (BMV) report used by the State to prove he was a habitual traffic offender was inadmissible hearsay. Kindel argued that the report was inadmissible hearsay under IRE 803(8)(c) because "the fact that an individual is an habitual traffic offender is an 'administrative factual finding made by an individual employed by the BMV.'"

The court of appeals held that the report from the BMV was admissible under IRE 803(8) and did not constitute a "factual finding" under IRE 803(8)(c).[175] The court reasoned that the finding of a habitual violator "is not the product of an investigation that requires the BMV to make inferential selections between possible truths."[176] The court further reasoned that such a finding does not require the BMV to make subjective interpretations that could taint its trustworthiness and thus should be treated as an "observation" to which the exclusions of IRE 803(8) do not apply.[177] Thus, under IRE 803(8) a report satisfying the foundational criteria would generally be found admissible, unless the report preparer is required to make a subjective interpretation or select inferentially from possible truths.

C. Rule 804—Hearsay Exceptions—Declarant Unavailable

Under IRE 804, hearsay is admissible if the declarant is unavailable and the testimony falls into one of four exceptions. These four exceptions are: (1) former testimony in a proceeding if the predecessor in interest had an opportunity and similar motive to develop the declarant's testimony; (2) a statement made by the declarant under the belief of impending death; (3) a statement against interest

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171. *See* D.W.S v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995).

172. IND. R. EVID. 803(8).

173. Coates v. State, 650 N.E.2d 58, 63 (Ind. Ct. App. 1995), *trans. denied*; Kindel v. State, 649 N.E.2d 117 (Ind. Ct. App. 1995).

174. 649 N.E.2d 117 (Ind. Ct. App. 1995).

175. *Id.* at 119.

176. *Id.*

177. *Id.*

made where no reasonable person would have made the statement unless believing it to be true; and (4) a statement of personal or family history.[178]

The court discussed the use of former testimony under IRE 804(b)(1) in *Kellems v. State*.[179] In *Kellems*, the defendant was convicted of dealing in cocaine. At trial, the defendant attempted to introduce into evidence the depositions of two alibi witnesses after the witnesses invoked their fifth amendment privilege and refused to testify. The prosecutor had previously deposed both alibi witnesses and charged both with perjury in relation to the statements made in their depositions. The court of appeals held that the trial court's exclusion of the depositions was an abuse of discretion.[180]

In holding that the trial court abused its discretion, the court found that the depositions were admissible under IRE 804(b)(1). The court reasoned that despite the evidence being in the form of depositions rather than live testimony, its admissibility was not allowed.[181] Furthermore, the court noted that the prosecutor, in initiating and taking the depositions, had the same opportunity and similar motive to develop the testimony of the alibi witnesses as required by the rule. Thus, because the witnesses were unavailable and because the prosecutor had sufficient previous opportunity to examine them, the court held that the depositions were admissible under IRE 804(b)(1).[182]

IX. ARTICLE IX—AUTHENTICATION OF EVIDENCE

Certain evidence must be authenticated prior to its admission before the trier of fact. As provided in IRE 901(a) the authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims it to be.[183] IRE 901(b) discusses nine examples of authentication sufficient to comply with IRE 901(a), however, the list is not meant to be exhaustive.[184] Some evidence is self-authenticating and does not require extrinsic evidence to properly authenticate it.[185] However, it is important to note that "[w]hile self-authentication of a document under IRE 902(1) relieves the proponent from submitting foundational testimony as to authenticity, it does not,

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178. IND. R. EVID. 801(b)(1)-(4).

179. 651 N.E.2d 326 (Ind. Ct. App. 1995).

180. *Id.* at 329-30.

181. *Id.* at 328.

182. *Id.* Because of the improper exclusion of the evidence coupled with the defendant's right to present witnesses, the court held that the trial court abused its discretion and granted the defendant a new trial. *Id.* at 329-30.

183. The testimony of a subscribing witness is not, however, necessary to authenticate a writing unless required by the jurisdiction whose laws govern the validity of the writing. IND. R. EVID. 903.

184. IND. R. EVID. 901(b)(1)-(9). IRE 901(b)(10) notes that further authentication methods may be provided by the Indiana Supreme Court, by statute or by the Indiana Constitution.

185. IND. R. EVID. 902. Such things include, for example, domestic public documents, newspapers and periodicals or certified records. IND. R. EVID. 902(1)-(10).

unlike Indiana law before adoption of the Rules of Evidence, guarantee admissibility."[186] Rather, the proponent must offer an independent basis for admissibility under the IRE for the evidence to be admitted.

X. ARTICLE X—BEST EVIDENCE RULE

Article X addresses the admissibility of writings, recordings and photographs.[187] In addition, IRE 1001 addresses the use of originals or duplicates of the media being offered. Under IRE 1002, the original media is required to prove the content of the offered media, except as provided by the IRE or statute. However, a duplicate of the media may be used unless a genuine question is raised as to the authenticity of the original, or under the circumstances it would be unfair to admit the duplicate.[188] Finally, in the instance where the originals are unavailable,[189] other evidence of the contents of the media is admissible.[190]

The contents of an official record may be proved by copy, certified as correct in accordance with IRE 902 or testified to be correct by a witness who has compared it with the original.[191] However, if a copy of the official record is not available or cannot be obtained with reasonable diligence, other evidence of the contents of the public record may be admitted.[192] In addition, where the media is voluminous, the contents of the media may be presented in the form of a chart, summary or calculation.[193]

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186. Coates v. State, 650 N.E.2d 58, 62 (Ind. Ct. App. 1995).

187. IRE 1001 defines writings, recordings and photographs in broad terms and the rule should be consulted to determine if the offered evidence falls into one of the categories.

188. IND. R. EVID. 1003.

189. The original is not required if the original is: lost or destroyed; not obtainable by any judicial process or procedure; in the possession of an opponent; or is not closely related to a controlling issue. IND. R. EVID. 1004(1)-(4).

190. Other evidence includes the testimony or the deposition of the party against whom offered or by a written admission. In this instance, the party need not account for the original of the media. IND. R. EVID. 1007.

191. IND. R. EVID. 1005.

192. *Id.*

193. IND. R. EVID. 1006. However, the original, or duplicates, from which the summary was produced shall be made available for examination by the other party.

1995 SURVEY OF INDIANA FAMILY LAW

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INTRODUCTION

During 1995,[1] the appellate courts addressed evolving areas of case law, including the rights and obligations of parents arising out of artificial insemination; the rights of persons cohabitating without agreements; and, the rights of homosexual parents. Additionally, new statutes were enacted which clarify the status of premarital agreements and a series of statutes were added to provide for greater sanctions against delinquent child support obligors. This Article will address these developments as well as other notable cases that commonly affect the family law practitioner.

I. ANTENUPTIAL AGREEMENTS

In 1995, Indiana adopted its version of the Uniform Premarital Agreement Act.[2] Indiana courts have typically recognized the validity of premarital (antenuptial or prenuptial) agreements. The statute now sets forth basic definitions, requirements, and exceptions for these types of agreements. Cases that have been issued prior to the enactment of the new statute can still be used to interpret agreements; however, one must be cautious to ensure that case law is not superseded by the statute.

The decision in *Rider v. Rider*,[3] although handed down prior to the Act's effective date, parallels the legislation. In *Rider*, the parties entered into an antenuptial agreement which provided that in the event of divorce neither party would have a right to seek support or alimony. The wife introduced evidence at the final hearing that she suffered from inflammatory neuropathy which caused her to quit work. The trial court awarded her maintenance due to her illness. The court of appeals affirmed the trial court.[4]

In its decision, the court stated generally that "antenuptial agreements fixing the property rights of each party upon dissolution of the marriage must be honored and enforced by the courts as written, absent a showing of fraud, coercion, undue influence, or other matters making the agreement unconscionable."[5] The court explained that, since *Boren* was decided, the court has considered whether events that exist at the time of "dissolution might make an antenuptial agreement

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1. This Article contains a few cases from 1994 that were highly controversial and publicly discussed. The authors thought the practitioner might benefit from their inclusion herein.
2. IND. CODE §§ 31-7-2.5-1 to -10 (Supp. 1995).
3. 648 N.E.2d 661 (Ind. Ct. App. 1995).
4. *Id.* at 666.
5. *Id.* at 664-5 (citing *In re* Marriage of Boren, 475 N.E.2d 690, 694 (Ind. 1985)).

unconscionable."[6] The court addressed this issue in *Justus v. Justus*[7] where it held that "[i]f an antenuptial agreement dividing property between the parties would leave a post-dissolution reality in which one spouse would not have sufficient property to provide for his reasonable needs, then the court may refuse to enforce the antenuptial agreement."[8] In the *Rider* case, the court used the *Justus* reasoning to find that "[a]n antenuptial provision limiting or eliminating spousal maintenance is unconscionable and will not be enforced when it would deprive a spouse of reasonable support that he or she is otherwise unable to secure."[9]

The new Premarital Agreement Act states that "[t]he modification or elimination of spousal maintenance" is a matter that may be contracted in a premarital agreement.[10] The Act also states that a court may choose not to enforce the agreement if "modification or elimination [of spousal maintenance] causes one (1) party to the agreement extreme hardship under circumstances not reasonably foreseeable at the time of the execution of the agreement . . . ."[11]

Other prenuptial agreement issues have been addressed in the past year. In *Hunsberger v. Hunsberger*,[12] the wife challenged the validity of the parties' prenuptial agreement. She alleged that the agreement was invalid due to her husband's failure to disclose the nature and value of his assets before she signed the agreement. The trial court agreed with the wife. The court of appeals reversed. The wife "did not allege that there was fraud, duress or misrepresentation surrounding the execution of the antenuptial agreement," nor did she allege unconscionability.[13] The court relied upon *Johnston v. Johnston*[14] and *In re Estate of Palamara*[15] in holding that there is no duty to disclose the value of assets prior to entering into a prenuptial agreement.[16]

Although *Hunsberger* was litigated and decided prior to the enactment of the Premarital Agreement Act, its holding is consistent with the Act. Premarital agreements must be in writing and signed by both parties, and are enforceable without consideration.[17] Further, the statute does not require mandatory disclosure of assets or the value thereof.

In *Lung v. Lung*,[18] the court addressed the issue of whether separate property listed in an antenuptial agreement can become marital property. In *Lung*, the husband and wife entered into an antenuptial agreement that did not restrict the

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6. *Id.* at 665.
7. 581 N.E.2d 1265, 1274 (Ind. Ct. App. 1991), *trans. denied.*
8. *Id.*
9. *Rider*, 648 N.E.2d at 665.
10. IND. CODE § 31-7-2.5-5(a)(4) (Supp. 1995).
11. *Id.* § 31-7-2.5-8(b).
12. 653 N.E.2d 118 (Ind. Ct. App.1995), *trans. denied.*
13. *Id.* at 126.
14. 184 N.E.2d 651 (Ind. App. 1962).
15. 513 N.E.2d 1223 (Ind. Ct. App. 1987).
16. *Hunsberger*, 653 N.E.2d at 125-26.
17. IND. CODE § 31-7-2.5-4 (Supp. 1995).
18. 655 N.E.2d 607 (Ind. Ct. App. 1995).

rights of either party to receive a voluntary transfer from the other party or to own real estate as tenancies by the entireties. The husband listed certain lake property on his list of separate property. Subsequent to the marriage, the husband executed a warranty deed conveying the lake property to himself and the wife, as husband and wife. The trial court found that the property constituted a marital asset and was subject to division in the dissolution action.[19] The court of appeals affirmed, stating that there was no evidence of fraud, undue influence, or involuntariness.[20] The court found that because the parties did not intend to restrict transfers of property or the creation of joint assets, the husband's voluntary transfer of the property removed it from its prior status as separate property and caused it to become marital property subject to distribution.[21]

II. Determination of Marital Property and Distribution

When dividing property in a dissolution action, four broad questions are addressed: Is it property? Is it marital property? What is the value of that property? And how should that property be divided?[22] These questions comprise the issues in the following cases.

In a case of first impression in Indiana, *Hann v. Hann*[23] addressed the issue of whether the husband's unvested,[24] unmatured stock options, which were granted to him by his employer, were marital property subject to division upon dissolution. The court held that they were not marital property subject to distribution.[25] The court cited several appellate decisions regarding vested pension benefits,[26] as well as the Indiana Code,[27] in support of its decision. The court found that unvested stock options are analogous to unvested pension plans. The court stated that "Indiana is to classify only those stock options granted to an employee by his or her employer which are exercisable upon the date of dissolution or separation

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19. *Id.* at 608-09.

20. *Id.* at 609.

21. *Id.* at 610.

22. Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 Ind. L. Rev. 363 (1990).

23. 655 N.E.2d 566 (Ind. Ct. App. 1995), *trans. denied.*

24. The court labeled the stock options "unvested" because the stock options would be subject to forfeiture if the husband died, was fired or otherwise terminated his employment. *Id.* at 569 n.1.

25. *Id.* at 571.

26. Mullins v. Matlock, 638 N.E.2d 854, 856 (Ind. Ct. App. 1994), *trans. denied*; Sadler v. Sadler, 428 N.E.2d 1305 (Ind. Ct. App. 1981); Hiscox v. Hiscox, 385 N.E.2d 1166 (Ind. App. 1979); Savage v. Savage, 374 N.E.2d 536 (Ind. App. 1978); Wilcox v. Wilcox, 365 N.E.2d 792 (Ind. App. 1977).

27. "The term 'property' means all the assets of either party or both parties, including: . . . (2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment, or that are vested . . . ." Ind. Code § 31-1-11.5-2(d) (1993).

which cannot be forfeited upon termination of employment as marital property."[28]

Berger v. Berger[29] addressed two questions: Is it marital property? and What is the value of the property? In *Berger*, the court of appeals found that the trial court erred when it failed to include the goodwill value of the husband's business in the property distribution scheme.[30] Prior to the parties' separation, the husband decided to sell his dental practice. The buyer was willing to pay $235,000—$105,750 for the assets of the business and $129,250 on a covenant not to compete. The agreement stated that part of the purchase price of the assets was for the goodwill of the practice. The $105,750 was included as a marital asset. The wife argued that the trial court erred by not including the value of the restrictive covenant in the marital estate. The court of appeals stated that even though the asset purchase agreement contained a provision for goodwill, "Indiana law has long held a restrictive covenant ancillary to the sale of a business represents the sale of the goodwill of that business . . . ."[31] The court recognized that part of the proceeds for the restrictive covenant were intended to be compensation for the husband's agreement not to compete and that part of the proceeds may be for future income.[32] The court remanded and ordered the trial court to make findings to determine the amount of the restrictive covenant that was intended to compensate the husband for the goodwill of the practice and to include that portion in the marital estate for distribution.[33]

While also addressing the issues of spousal maintenance and property distribution, *Fuehrer v. Fuehrer*[34] primarily reaffirms the general principle that the marital pot closes on the date the petition for dissolution of marriage is filed and that post-filing debts are not marital debts. In *Fuehrer*, the wife was diagnosed with a rare and deadly form of cancer *during* the parties' separation period. She underwent extensive surgery and chemotherapy treatments and incurred $11,000 in medical bills and $3,000 in credit card debt for clothing and other necessaries. The trial court divided the marital estate fifty/fifty; however, it included the wife's post-filing debts in the marital pot, consequently reducing the husband's distribution. The court stated that "debts incurred by one party after the dissolution petition has been filed, including debts for medical expenses, are not to be included in the marital pot."[35] The court of appeals reversed the trial court and remanded the case back to the trial court with instructions to exclude the debt from the marital estate and to modify the distribution plan if necessary.[36]

Simpson v. Simpson[37] primarily involved the question concerning what is a fair

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28. *Hann*, 655 N.E.2d at 571.
29. 648 N.E.2d 378 (Ind. Ct. App. 1995).
30. *Id.* at 384.
31. *Id.* at 383.
32. *Id.* at 384.
33. *Id.*
34. 651 N.E.2d 1171 (Ind. Ct. App. 1995), *trans. denied.*
35. *Id.* at 1173.
36. *Id.* at 1174.
37. 650 N.E.2d 333 (Ind. Ct. App. 1995).

property division in light of the rebuttable presumption that a fifty/fifty split is fair.[38] In *Simpson*, the husband appealed the trial court's distribution of the marital estate where it distributed sixty-five percent to the wife and thirty-five percent to the husband. The court of appeals affirmed the trial court stating that "[r]eversal of the trial court's decision is appropriate only where the decision is clearly against the logic and effect of the facts and circumstances."[39] The court of appeals observed that the trial court considered the wife's inheritance, the husband's dissipation, the parties unequal incomes, the wife's interrupted employment and education to be a wife and mother, and the wife's unequal earning capacity.[40] Because all are appropriate factors to be weighed under Indiana Code section 31-1-11.5-11(c),[41] the court of appeals held that the trial court did not abuse its discretion.[42]

The husband also raised the issue of whether his work bonus was properly included in the marital estate. The court found that even though the bonus was contingent upon him being employed in March 1992 (after the date of filing, but before the final dissolution order), the bonus was properly considered to be part of the marital estate.[43]

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38. *Id.* at 335. IND. CODE § 31-1-11.5-11(c) (1995) states:

> The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:
>
> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
>
> (2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.
>
> (3) The economic circumstances of each spouse at the time the disposition of property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.
>
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
>
> (5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

39. *Simpson*, 650 N.E.2d at 335.

40. *Id.* at 336.

41. *See supra* note 38 for text of this statute.

42. *Simpson*, 650 N.E.2d at 336.

43. *Id.* (citing Libunao v. Libunao, 388 N.E.2d 574, 577 (Ind. App. 1979) (property with vested interest at time of dissolution may be divided as marital asset)). *See also In re* Marriage of Adams, 535 N.E.2d 124, 126-27 (Ind. 1989) (police pension vesting after date of filing, but before final hearing, is marital property even though police officer continued employment and would not have contractual pension rights until actual retirement because the pension was acquired by the parties "joint efforts").

III. CHILD CUSTODY

A. Modification of Custody Orders

Doubiago v. McClarney[44] is the first reported decision interpreting the standard for modification of child custody orders since the 1994 legislative amendments to the statute.[45] In *Doubiago*, the parties shared joint legal custody, with the mother being the primary custodian. The father was granted a modification of custody based upon plentiful evidence of the mother's inability to control her anger toward others and the child. The court noted that some of the mother's problems existed at the time of dissolution, but had since become worse. Thus, from the decision, the new amendments appear to have had no effect on the outcome.

B. Jurisdiction

Two cases involving Indiana's version of the Uniform Child Custody

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44. 659 N.E.2d 1086 (Ind. Ct. App. 1995), *trans. denied.*

45. IND. CODE § 31-1-11.5-22(d) (Supp. 1995). Regarding the modification of a divorce court's custody order the statute states:

> The court may not modify a child custody order unless:
>
> (1) it is in the best interests of the child; and
>
> (2) there is a substantial change in one (1) or more of the factors which the court may consider under section 21(a) of this chapter.

Section 21 lists a number of relevant factors to be considered by the court in an initial custody determination such as the age and sex of the child, the health of all individuals involved, the child's adjustment, the child's relationship with significant persons in the child's life, the parent's wishes, and the wishes of the child. The 1994 legislative amendments now provide, however, that "more consideration [be] given to the child's wishes if the child is at least fourteen (14) years of age . . . ." *Id.* § 31-1-11.5-21(a)(3). Prior to the 1994 amendments, the statute permitted modification "only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable." The factors under section 21 of the statute, prior to the 1994 amendments did not give any special weight to the preference of a child fourteen (14) or over. In practice, substantially changed circumstances had to amount to more than isolated acts of misconduct, Pea v. Pea, 498 N.E.2d 110, 113-14 (Ind. Ct. App. 1986), *trans. denied*, and could not be based solely on improvement in the non-custodial parent's circumstances, regardless of how potentially beneficial to the child, even if the child wanted to live with the noncustodial parent. *See* Drake v. Washburn, 567 N.E.2d 1188 (Ind. Ct. App. 1991). The amendments have also been made applicable to the statutes concerning an initial custody determination and modifications in paternity actions. IND. CODE § 31-6-6.1-11(a), (e) (Supp. 1995). It is not necessarily well known that the paternity statute formerly permitted the court to modify custody solely on a finding that it would be in the best interest of the child without any finding of a "substantial and continuing change [of] circumstances." *See In re* Grissom, 587 N.E.2d 114 (Ind. 1992) (discussing Griffith v. Webb, 464 N.E.2d 384 (Ind. Ct. App. 1984), and Walker v. Chatfield, 553 N.E.2d 490 (Ind. Ct. App. 1990)). The recent amendments now completely end the disparity in the burden of proof between custody modification litigants, post-divorce and post-paternity.

Jurisdiction Act (UCCJA)[46] involve some relatively novel situations. In *Cabanaw v. Cabanaw*,[47] the former wife brought an interlocutory appeal of the trial court's determination that it retained jurisdiction to modify its initial custody decree and that the trial court was not an inconvenient forum. In *Cabanaw*, the wife relocated to Florida at the time of the divorce. The father remained in Indiana and both parties used both Indiana and Florida courts to raise additional questions concerning the custody and the visitation orders.

During one of the actions in Florida, the parties entered into an agreement that purportedly tried to control jurisdiction by requiring the husband to initially invoke only the jurisdiction of a Florida court in subsequent custody disputes. However, the Florida court, in approving the agreement, explicitly stated that it was not making a determination of jurisdiction. Because father continued to reside in Indiana and the children continued to have substantial contacts with him in Indiana, mother was faced with the well established principle that the court making the initial custody determination retains that jurisdiction so long as one parent remains within the state providing it with a "significant connection" to the children.[48] In *Cabanaw*, the mother asserted that the question was not whether Florida or Indiana had jurisdiction to modify the Indiana decree, but which state should decide the issue of jurisdiction. Her argument was rejected "because jurisdiction cannot be imposed by consent of the parties."[49] However, crucial to the court's determination is the fact that the Florida court on two occasions specifically stated that it was not reaching the issue of whether or not it had jurisdiction in approving various agreements of the parties.[50]

In *Stephens v. Stephens*,[51] the court recognized that it is possible for more than one state to qualify for initial subject-matter jurisdiction.[52] In *Stephens*, the parties were married in Kentucky with the wife maintaining her residence there and the husband maintaining a residence in Indianapolis. A few weeks after their child was born, the wife moved to Indianapolis with the husband temporarily and then to a new home in Mooresville. Within two months, the wife had returned to Kentucky with the parties' daughter and sought the protection of an emergency protective order against the husband. The husband filed a custody proceeding in Indiana within a few days of the filing of the Kentucky action. The husband argued that Indiana had initial subject-matter jurisdiction and that the protective order proceeding in Kentucky, which gave the wife temporary custody of the parties' child, was not a custody statute contemplated by the UCCJA. The Indiana trial court disagreed, however, and dismissed the husband's action in deference to the Kentucky proceeding.

On appeal, the court held that while Indiana could be considered the child's

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46. IND. CODE §§ 31-1-11.6-1 to -25 (1993 & Supp. 1995).
47. 648 N.E.2d 694 (Ind. Ct. App. 1995).
48. *See* Francis v. Francis, 654 N.E.2d 4, 6 (Ind. Ct. App. 1995), *trans. denied.*
49. *Cabanaw*, 648 N.E.2d at 697.
50. *Id.* at 698.
51. 646 N.E.2d 682 (Ind. Ct. App. 1995).
52. *Id.* at 685.

home state the court could not "say, as a matter of law, that Kentucky [was] not also a 'home state.'"[53] Rather, the crucial question to the court was whether the Indiana court should have exercised its jurisdiction, assuming it had jurisdiction. Citing the statute, the court held that if there is a custody proceeding pending in another state that does have jurisdiction, the trial court may not exercise its jurisdiction unless the other state declines its jurisdiction.[54] Because the Kentucky emergency protective order form incorporated Kentucky's version of the UCCJA, the court held that, under section 6 of the UCCJA, a court of this state could not exercise its jurisdiction if, at the time of the filing the petition, a proceeding was pending in another state exercising jurisdiction substantially in conformity with Indiana law.[55]

C. Third Party Natural Parent Custody Disputes[56]

The case of *Teegarden v. Teegarden*[57] was a very controversial and much publicized case regarding the custodial rights of a homosexual parent. In *Teegarden*, the mother and father divorced in 1990 and the father received custody of the parties' two minor boys. The mother was a homosexual. The father remarried two years later and then died in 1993. When the mother's petition for immediate custody was denied for jurisdictional reasons, she filed an action asking for an order for custody. The stepmother also filed a petition for custody alleging "that 'circumstances and questions of parental fitness dictate that it is in the best interests of [the children] that Stepmother be granted custody . . . .'"[58] The trial court found that pursuant to Indiana law, the mother "'had the right to custody of her children without court proceedings.'"[59] The court entered an order granting the mother custody, however, it conditioned custody upon the mother: "'(1) not co-habitating with women with whom she is maintaining a homosexual relationship; and (2) not engaging in homosexual activity in the presence of the children.'"[60] The court of appeals found the imposition of these restrictions to be an abuse of discretion.[61] The trial court specifically found that the stepmother failed to prove that the mother's homosexuality made her an unfit parent for purposes of custody.[62] The court of appeals adopted a view similar to that of other jurisdictions and held that "homosexuality standing alone without evidence of any

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53. *Id.* at 686.

54. *Id.*

55. *Id.* at 686-87.

56. For a more complete discussion of the development of this area of custody litigation, see Michael G. Ruppert & Monty K. Woolsey, *The Continuing Evolution of Indiana's Family Law in 1991*, 25 IND. L. REV. 1243, 1259-63 (1992).

57. 642 N.E.2d 1007 (Ind. Ct. App. 1994).

58. *Id.* at 1008 (citing the record).

59. *Id.*

60. *Id.* (citing the Record).

61. *Id.* at 1010.

62. *Id.* at 1009.

adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child."[63]

IV. CHILD SUPPORT

In 1995, the legislature enacted federally mandated legislation that is sure to attract the attention of numerous child support obligors in the state. Indiana Code sections 31-1-11.5-13(j) and (k); sections 9-25-6-19 and 20; and sections 12-17-2-34 and 35 became effective October 1, 1995. These statutes state, generally, that when a court finds a person delinquent in the payment of child support[64] or committing "an intentional violation of an order for support, the court shall issue an order to the bureau of motor vehicles" ordering that any driver's license or permit held by the delinquent obligor be suspended or a permit or license not be issued until further order of the court.[65] The statutes also provide for revocation or non-issuance of professional licenses, including those of attorneys, teachers or other professional persons.[66] Although there are no cases interpreting this statute yet, on its face it would appear that to revoke a professional license, the court must find an intentional violation of a support order, not just a delinquency.

Because cases dealing with support of a child can encompass many components, there are always numerous decisions in this area. A few involving new or problematic issues have been selected for this Article.

The following case will be of interest to those who become parents at an advanced age. In *Stultz v. Stultz*,[67] the Indiana Supreme Court vacated the opinion of the court of appeals and affirmed the trial court's finding that a father was not entitled to credit against his child support obligation where his children were receiving Social Security retirement benefits. The court relied upon three prior cases decided by the court of appeals in reaching its decision. *Head v. State*[68] held that Title II Social Security Disability benefits received by a child were not child support and therefore could not be subject to assignment to the state to offset AFDC payments. In *Brummett v. Brummett*,[69] the court found that a child's receipt of Social Security survivor's benefits did not justify modification of the "child support obligation initially owed by the child's father and, after his death,

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63. *Id.* at 1010. *See* Caban v. Healey, 634 N.E.2d 540, 543 (1994) (concerning the criteria for court-ordered visitation between children and an unrelated third party).

64. As defined by IND. CODE § 12-17-2-34 (Supp. 1995), which states that

(a) . . . 'delinquent' means at least:

(1) two thousand dollars ($2,000); or

(2) three (3) months; past due on payment of court ordered child support payments.

65. IND. CODE § 31-1-11.5-13(j)(1)-(2) (Supp. 1995).

66. *Id.* § 31-1-11.5-13(k)(1)-(2).

67. 659 N.E.2d 125 (Ind. 1995).

68. 632 N.E.2d 749, 751-52 (Ind. Ct. App. 1994).

69. 472 N.E.2d 616 (Ind. Ct. App. 1984).

owed by his estate."[70] Finally, in *Kyle v. Kyle*,[71] the court of appeals held that where a disabled child receives Title XVI Supplemental Security Income, the noncustodial parent is not entitled to have his child support obligation reduced.

These cases stand for the general principle that where children are entitled to receive Social Security benefits, the benefit payments are not intended to be a substitute for child support. The supreme court stated that, as a general rule, when eligible children receive social security benefits because of a parent's retirement, the child support obligor should not be entitled to offset his obligation.[72]

The court of appeals stated quite succinctly in *Holsapple v. Herron*[73] that "when a criminal act or the resulting consequences therefrom is the primary cause of an obligor-parent's failure to pay child support, abatement of said obligation is not warranted."[74] The court stated that "[i]t would be contrary to the Indiana Child Support Guidelines and to the . . . public policy favoring a child's security to . . . allow [child support] payments to abate . . . [for] a willful, unlawful act of the obligor."[75]

A very problematic area for practitioners and courts is the calculation of a parent's overtime into a child support figure. In *Mullin v. Mullin*,[76] the mother appealed a trial court's order granting the father's petition for modification of child support. The original child support figure included all of the father's overtime pay. The father testified that since the time of the divorce, his earnings had been reduced from $23 per hour to $14.77 per hour. He was working approximately thirteen hours of overtime per week to make ends meet. He testified that his increased overtime had impinged on his ability to exercise his visitation rights with his children. The trial court found that a modification was warranted under Indiana Code section 31-1-11.5-17(a).[77] The court looked to Indiana Child Support Guideline 3 (Commentary 2.b.) which states,

> the includability of overtime wages in the noncustodial parent's income

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70. *Stultz*, 659 N.E.2d at 129.
71. 582 N.E.2d 842 (Ind. Ct. App. 1991), *trans. denied.*
72. *Stultz*, 659 N.E.2d at 130.
73. 649 N.E.2d 140 (Ind. Ct. App. 1995).
74. *Id.* at 141.
75. *Id.* at 142 (citing Davis v. Vance, 574 N.E.2d 330, 331 (Ind. Ct. App. 1991)).
76. 634 N.E.2d 1340 (Ind. Ct. App. 1994).
77. *Id.* at 1341. The pertinent part of the Indiana Code states:

> Provisions of an order with respect to child support . . . may be modified or revoked. Such modification shall be made only:
>
> (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
>
> (2) upon a showing that:
>
> (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines . . . .

IND. CODE § 31-1-11.5-17(a) (1993).

> is a fact sensitive matter and it is not the intent of the guidelines to require a party who has worked a great deal of overtime to continue doing so indefinitely just to meet a support obligation based on that higher level of earnings.[78]

The court of appeals found that the trial court did not commit error by including only twenty percent of the father's overtime so that he might cut back on the overtime to enjoy visitation with his sons.[79]

The noncustodial mother in *Hazuga v. Hazuga*[80] raised an interesting argument regarding deductions on the child support worksheet for health insurance and child care costs when they are paid from the father's pre-tax income. The mother argued that the deductions listed on the child support worksheet should be reduced by the father's tax savings. In this case, the father paid $55 per week for health insurance. Because the payments were made with pre-tax dollars, the mother argued that the father's tax savings of $16.50 should be excluded from the worksheet, thus making the actual deduction $38.50. She used the same analogy for child care expenses. The court rejected the mother's arguments stating that child support is calculated using weekly gross income. The court said that any tax savings that comes from deducting those expenses is irrelevant to a calculation of child support.[81]

The mother further argued in her appeal that the trial court erred by ordering her to pay forty-eight percent of the child's uninsured medical expenses. The court of appeals agreed with the mother on this issue citing the Commentary to Child Support Guideline 3(E). The revised Guidelines, effective March 1993, state that the "guidelines require that where the presumptive amount has been ordered, the custodial parent shall be responsible for yearly uninsured medical expenses up to 6% of the yearly amount of support before requiring the non-custodial parent to contribute because 6% of the presumptive guideline amount is for health care expense."[82] The court reversed on this ground.[83]

V. Defining a Parent's Obligation to a Child

Another highly publicized case was the matter of *Straub v. B.M.T. ex rel. Todd*.[84] Todd and Straub were involved in a romantic relationship. In 1986, Todd and Straub entered into a contract whereby Straub agreed to impregnate Todd in return for her promise to hold Straub harmless from any financial or legal obligation toward the child. Todd did indeed become pregnant and gave birth to the parties' child. Just over three years later, Todd filed a petition asking the court to declare Straub the father of the child and order him to pay child support and

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78. *Mullin*, 634 N.E.2d at 1342.
79. *Id.*
80. 648 N.E.2d 391 (Ind. Ct. App. 1995).
81. *Id.* at 394.
82. *Id.* at 394-95 (citing, CHILD SUPPORT GUIDELINE 3(E) Commentary (1993)).
83. *Id.* at 395.
84. 645 N.E.2d 597 (Ind. 1994).

certain medical expenses. The trial court granted Todd's petition and the Indiana Supreme Court affirmed. The court stated that it is against public policy for one parent to have the right to contract away the child's right to support.[85] The court also stated that "[u]sing sexual intercourse as consideration is itself against public policy."[86]

In the world of advanced reproductive technology, courts are finding themselves presented with interesting and difficult situations regarding the rights of parents. In a case of first impression, the Indiana Supreme Court addressed the issue of the obligation of a father to support a child conceived during the marriage by artificial insemination through a third party donor. In *Levin v. Levin*,[87] the court likened this situation to an adoption during the marriage. The court held that where a husband and wife were fully informed and consented to the artificial insemination, both parents have an obligation to support the child.[88] In this particular case, the court also found that the husband had held the child out as his own for over fifteen years; therefore, he was equitably estopped from denying his obligations towards the child.[89]

VI. MISCELLANEOUS

The case of *Bright v. Kuehl*,[90] while technically a contractual dispute, is a case that family law practitioners should review. This case of first impression addresses the issue of what happens when two people live together without marrying or signing a cohabitation agreement, commingle funds, and then decide to separate. In *Bright*, the man, Kuehl, brought an action against Bright seeking damages arising from Bright's unauthorized use of his checking account and credit cards. Additionally, he sought damages for Bright's destruction of personal property, medical bills incurred due to attacks by Bright, and excessive use of the telephone. Kuehl also sought punitive damages. Bright counterclaimed for unjust enrichment because Kuehl retained the parties' personal property. The trial court found in favor of Kuehl and awarded $28,270.39. It also found in favor of Bright on her counterclaim and awarded her $5,759 in damages.[91]

The court of appeals reversed the trial court's decision. The court determined that "a party who cohabitates with another without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment."[92] Upon reviewing the record, the court did not find any evidence that the parties had an implied contract to

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85. *Id.* at 600.
86. *Id.* at 601.
87. 645 N.E.2d 601 (Ind. 1994).
88. *Id.* at 605.
89. *Id.* at 604-05.
90. 650 N.E.2d 311 (Ind. Ct. App. 1995), *trans. denied.*
91. *Id.* at 313.
92. *Id.* at 315.

reimburse the other party if the relationship soured.[93] The court found that the circumstances of the case did not support an implied contract, therefore Kuehl was not entitled to damages. The court additionally stated that because there was not an award of damages, there could be no award of punitive damages.[94]

The case of *Daugherty v. Ritter*[95] addressed the 1993 revision to the Grandparent Visitation Statute.[96] The former statute precluded visitation with a grandparent if the parent did not consent to the visitation. The revision created the possibility that, in certain circumstances, courts could grant visitation to grandparents even though there may be dissension between the custodial parent and the grandparents.

In *Daugherty*, the trial court denied the grandparents' petition for visitation. The grandparents argued on appeal that the trial court was required to consider the prior relationship they had with their grandchild. The court stated in its affirmance that the revision to the statute does not create a presumption in favor of visitation being granted where the grandparents have had, or have attempted to have, contact with the child; rather, it is left to the discretion of the trial court to determine whether, in the totality of the circumstances, visitation between the child and the grandparents is in the child's best interests.[97] Although the grandparents may have had substantial contacts with the child prior to the disagreement with the parents, this does not automatically give the grandparents the right to visitation.

CONCLUSION

In the past year, the court has focused on defining parties' rights and obligations to each other and to children. Case law and legislation make it clear that the duties owed to children will be enforced and that it will not be easy to avoid the obligation. In this world of absentee parents, the judicial system and lawmakers are trying to guarantee to the child the right of financial support.

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93. *Id.*

94. *Id.* at 317.

95. 646 N.E.2d 66 (Ind. Ct. App. 1995), *aff'd*, 652 N.E.2d 502 (Ind. 1995).

96. "In determining the best interests of the child under this section, the court may consider whether a grandparent has had, or has attempted to have, meaningful contact with the child." IND. CODE § 31-1-11.7-3(b) (Supp. 1995).

97. *Daugherty*, 646 N.E.2d at 68.

HEALTH CARE LAW: A SURVEY OF 1995 DEVELOPMENTS

JOHN C. RENDER*

INTRODUCTION

In company with most recent years, the 1995 Survey period was noteworthy for several important and instructive developments in the area of health care law. As this area of law continues to be affected frequently by swiftly changing judicial, legislative and regulatory pronouncements, this Survey emphasizes those issues of most immediate import or of most significant change to the health care law practitioner. While not all inclusive, this Survey presents a summary of important modifications or additions in areas of Medicare and Medicaid reimbursement, medical malpractice, tax exemption, physician recruitment, and fraud and abuse.

I. MAJOR INDIANA HEALTH LAW DEVELOPMENTS—GENERAL

A. Statutory Developments

1. Tax Exemptions for Hospital-Owned Physician Offices and Other Hospital-Owned Property.—House Enrolled Act 1598 amended Indiana Code section 6-1.1-10-16 retroactive to March 1, 1995, to allow an exemption from property taxation if the property is owned or occupied by a non-profit hospital already granted tax exempt status. The hospital-owned property must be used for charitable purposes.[1] This law allows hospitals that own physician practices, offices or other hospital-owned property an exemption from property taxes by clarifying requirements for exemption that existed under prior law. However, the physician office, practice or other property must provide or support the provision of charity care or the provision of community benefits. Participation in the Medicaid or Medicare programs alone does not entitle an office, practice or other property described in the new legislation to an exemption from property taxes.[2]

2. Managed Care Organizations may not Require Health Care Providers to Seek Accreditation in order to Enter into a Managed Care Contract.—Senate Enrolled Act 560 amended Indiana Code section 27-8-10-3(2) to prohibit managed care organizations from refusing to enter into agreements with health care providers solely because the provider has not obtained accreditation from an accreditation organization. This is of particular significance to hospitals that are not accredited by the Joint Commission on the Accreditation of Healthcare

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1. IND. CODE § 6-1.1-10-16 (Supp. 1995).
2. *Id.* § 6-1.1-10-18.5(a)(1) & (2).

Organizations (JCAHO).[3] While most Indiana hospitals are accredited by the JCAHO, some choose not to seek JCAHO accreditation. Hospitals not accredited by JCAHO are surveyed for compliance with the Medicare and Medicaid Conditions of Participation[4] by the Indiana State Department of Health. However, this Act does not prohibit managed care organizations from implementing performance indicators as quality standards if they are developed by a private organization and do not rely upon a survey process (i.e., an accreditation entity) for which a fee is charged.[5]

3. Organ and Tissue Donation.—House Enrolled Act 1090 amended Indiana Code sections 29-2-16-1 to 29-2-16-28 concerning the provision of organ and tissue donation. One amendment provides that the hospital administrator or the hospital administrator's designee may ask any patient who is at least eighteen (18) years of age if the patient is an organ or tissue donor or if the patient desires to become an organ or tissue donor.[6] However, the governing board of the hospital must adopt procedures to determine when the administrator or administrator's designee may inquire of the patient as to organ or tissue donation.[7]

This amendment also states if at or near the time of death of a patient the hospital knows that:

> (1) an organ gift has or will be made;
> (2) the coroner has released a transplantation body part within the coroner's custody; or
> (3) the patient or individual in transit to the hospital is identified as an organ or tissue donor then the hospital shall notify the potential organ donee if the donee has been named and is known to the hospital. If the donee is not known to the hospital, the hospital shall notify an organ procurement organization.[8]

The amended law also requires the hospital, upon admission of an individual at or near the time of death, to make a reasonable search for information identifying whether the individual is an organ or tissue donor.[9] Finally, the hospital must establish agreements or affiliations for the coordination of organ procurement after consultation with other hospitals and organ procurement organizations.[10]

4. Criminal Background Checks for Certified Nurse Aides and Other Employees of Licensed Health Facilities.—House Enrolled Act 1752 added a class of health care personnel for which criminal background checks must be obtained

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3. JCAHO accredits hospitals on a voluntary basis at the option of the hospital. Hospitals accredited by the JCAHO are deemed to be in compliance with the Medicare Conditions of Participation found at 42 C.F.R. pt. 482 (1994).

4. 42 C.F.R. pt. 482 (1994).

5. IND. CODE § 27-8-10-3(c)(1), (2) (Supp. 1995).

6. *Id.* § 29-2-16-10(b).

7. *Id.* § 29-2-16-10(c).

8. *Id.* § 29-2-16-13.

9. *Id.* § 29-2-16-14(a)(2).

10. *Id.* § 29-2-16-15.

prior to employment in a licensed health facility or hospital-based health facility.[11] Existing Indiana law for home health agencies requires criminal background checks to be obtained on prospective home health aides employed by a home health agency.

House Bill 1752 added a new section, Indiana Code section 16-28-13-4, which requires a health facility or hospital-based health facility to obtain criminal background checks for nurse aides or other unlicensed employees prior to employment in a health facility or a hospital-based health facility.[12] However, this new section of the Indiana Code does not require criminal background checks on health professionals licensed pursuant to Indiana Code section 25-1-9-3, which includes registered dietitians or volunteers who provide nursing or nursing-related services without pay.[13]

The individual may not be employed by the health facility or hospital-based health facility if the criminal background check reveals the nurse aide or unlicensed employee of the health facility or hospital-based health facility has been convicted of rape, criminal deviate conduct, exploitation of an endangered adult, failure to report battery, neglect or exploitation of an endangered adult, theft, conviction less than five years before the individual's employment date, murder, voluntary manslaughter within the previous five years, felony battery within the previous five years or a felony relating to controlled substances within the previous five years.[14] The health facility or hospital-based health facility must apply within three (3) business days from the date the person is employed as a nurse aide or other unlicensed employee for a copy of the prospective employee's limited criminal history from the Indiana Central Repository for Criminal History Information under Indiana Code section 5-2-5-1 or any other source allowed by law.[15]

The health facility or hospital-based health facility may require the nurses aide or other unlicensed employee to pay for the fee to obtain the criminal background history check or to reimburse fees incurred by the facility in obtaining the limited criminal background check.[16] Finally, an individual who is denied employment or is dismissed from employment due to information received pursuant to the limited criminal history background check has no cause of action based upon the denial of employment or dismissal from employment from the health facility or hospital-based health facility.[17]

This new statutory requirement could have a negative effect on health facilities and hospital-based health facilities because it may take a considerable amount of time to obtain the limited criminal background history check from the Indiana Central Repository thus delaying the processing of prospective employees who are

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11. *Id.* § 29-2-16-28.
12. *Id.* § 16-28-13-1(a) & (b).
13. *Id.* § 16-28-13-1(b).
14. *Id.* § 16-28-13-3(a)(1)-(10).
15. *Id.* § 16-28-13-4.
16. *Id.* § 16-28-13-6(b)(1), (2).
17. *Id.* § 16-28-13-8.

in particularly short supply. Although the statute allows for health facilities or hospital-based health facilities to obtain the limited criminal history information from "another source allowed by law," no Indiana law currently allows for alternative sources to retrieve this information.

5. Affidavits Acknowledging Paternity.—House Enrolled Act 1006 amended Indiana Code section 16-37-2-2.1 to require all personnel of a public or private hospital who attend the birth of a child born out of wedlock to provide an opportunity for the child's mother and a male who reasonably appears to be the child's biological father to execute an affidavit acknowledging the child's paternity.[18] The affidavit shall be executed on a form provided by the Indiana State Department of Health and is not valid if executed more than seventy-two hours after the child's birth or after the mother of the child has executed a consent for the adoption of the child and an adoption petition has been filed.[19]

6. Release of Survey Reports by the Indiana State Department of Health.—House Enrolled Act 1206 added a new provision to the Indiana Code at section 16-19-3-25 regarding health provider survey inspection reports performed by the Indiana State Department of Health. The new law states that the recipient of an inspection report has ten calendar days to respond to the inspection report before it is released to the public.[20] However, the Indiana State Department of Health may release the inspection report and any records relating to the inspection report to the public if such release is necessary to protect the public from an imminent threat to health or safety or to protect a consumer of health services from an imminent threat to health or safety.[21] Finally, after the inspection report is released, the inspection report and the records relating thereto may be inspected and copied by interested parties pursuant to Indiana Code section 5-14-3-3(a) and (b).

This addition to the law could limit the ability of health care providers to respond in a timely manner to an inspection performed by the Indiana State Department of Health. Previously, the Indiana State Department of Health's policy allowed providers up to thirty days to respond to the inspection reports before release to the public. Therefore, this addition gives providers significantly less time in which to respond, especially where it is determined that an imminent threat to the health or safety of patients exists. This is of special concern due to the provider's inability to provide the Indiana State Department of Health with any additional information or an acceptable plan of correction[22] when the provider is cited for an adverse inspection report.

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18. *Id.* § 16-37-2-2.1(a)(1), (2).

19. *Id.* § 16-37-2-2.1(b).

20. *Id.* § 16-19-3-25(b).

21. *Id.* § 16-19-3-25(c) (1), (2).

22. A plan of correction constitutes the provider's response to the inspection report of the Indiana State Department of Health.

II. REIMBURSEMENT ISSUES

A. Statutory Developments

1. Changes in Indiana Medicaid Disproportionate Share Hospital ("DSH") Payment Levels.—The Indiana legislature has redistributed "basic disproportionate share"[23] monies for the benefit of "small hospitals."[24] House Enrolled Act 1701 increased the amount of the basic disproportionate share hospital ("DSH") pool for these hospitals from $2,000,000 to an amount not to exceed $5,000,000.[25] The basic DSH pool for large hospitals remained the same at $18,000,000.[26] The basic DSH pool for private psychiatric institutions[27] was decreased from $9,000,000 to $2,000,000.[28] To offset this steep reduction, the Office of Medicaid Policy and Planning ("OMPP") agreed to increase the Medicaid per diem rates available to private psychiatric institutions from $346 to an effective rate of $450.[29] Qualifying state mental health institutions benefited as their DSH pool was increased from

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23. A basic disproportionate share provider is a hospital whose Medicaid inpatient utilization rate is one standard deviation above the mean, or one whose low income utilization rate exceeds 25% or has 20,000 or more Medicaid inpatient days per year. IND. CODE § 12-15-16-1(a) (1993). However, see note 32 *infra* and accompanying text (discussing the additional requirement in the new law that a hospital have a Medicare Utilization Rate of at least 1% to qualify as a DSH). The Indiana Code also provides for "enhanced disproportionate share providers." An enhanced disproportionate share provider is a hospital that as of the cost reporting period for July 1, 1992 had at least 6,000 Medicaid inpatient days and at least 750 Medicaid discharges along with either a Medicaid inpatient utilization rate of one standard deviation above the state mean where the utilization rate for providers whose low income utilization rate exceeds 25% is excluded from calculating the mean Medicaid inpatient utilization rate, or the provider's low income utilization rate exceeds 25%. IND. CODE § 12-15-16-1 (1993). Enhanced disproportionate share hospitals are eligible for additional disproportionate share adjustments under IND. CODE § 12-15-19-1 (1993 & Supp.1995). Total basic and enhanced disproportionate share payments to a hospital are limited to the hospital specific limit provided under 42 U.S.C. 1396r-4(g) (1994). *See also* IND. CODE § 12-15-19-1(c) (1993).

24. The statute does not use the term "small hospital" but requires a hospital to have a Medicaid inpatient utilization rate at least one standard deviation above the mean to qualify as a Disproportionate Share Hospital ("DSH"). IND. CODE § 12-15-16-1(a)(1) (1993). Those acute care hospitals with 20,000 or more Medicaid inpatient days are viewed as large hospitals and receive monies from a separate pool. *Id.* § 12-15-16-1(a)(3). *See also* note 26 *infra* and accompanying text (discussing the large hospital DSH pool).

25. IND. CODE § 12-15-16-6(c)(1) (Supp. 1995).

26. *Id.* § 12-15-16-6(c)(6).

27. A private psychiatric institution is one licensed to treat "psychiatric disorders, developmental disabilities, convulsive disturbances, or other abnormal mental conditions." IND. CODE § 12-25-1-1 (1993).

28. IND. CODE § 12-15-16-6(c)(4) (Supp. 1995).

29. Timothy W. Kennedy, *State Legislative Wrap-Up and Case Law Update*, INDIANA LEGAL FORUM, Aug. 11, 1995, at 77.

$132,000,000 to $191,000,000.[30]

The statute was changed to require all providers qualifying under Indiana Code section 12-15-16-1(a) to have an inpatient Medicare Utilization Rate[31] of at least one percent in order to qualify as a DSH.[32] The state also acted to make state law consistent with new federal standards that cap a hospital's DSH reimbursement to the costs the hospital incurred in treating Medicaid patients.[33]

2. Hospital Care for the Indigent Program.—House Enrolled Act 1701 also streamlined the process by which hospitals receive payments under Indiana's Hospital Care for the Indigent Program ("HCI"). Under the new law, a total of $35,000,000 a year is devoted to this program. Payment is in the form of a per diem rate which is added to each hospital's Medicaid base inpatient payment rate.[34] The level of payment for each hospital is determined by dividing HCI payments to the hospital in Fiscal Year 1992 under the program by total Medicaid patient days in the same year.[35] Thus, hospitals with higher than usual levels of Medicaid inpatient days in Fiscal Year 1992 are locked into a more favorable HCI reimbursement rate.[36] The effective result of these provisions is that every year hospitals receive the same amount of base HCI reimbursement as they did in 1992 except for a slight annual increase due to a proportionate increase paid into the HCI fund.[37]

3. Recovering and Paying Interest on Provider Overpayments Situations.—The state has authorized the collection of interest against providers that are overpaid under the Medicaid program and the payment to providers for interest when the program erroneously recovers an "overpayment." When an amount paid to a provider is later determined by an audit, settlement, or judicial or administrative proceeding to have been in excess, the state may recover interest at a rate two percentage points to the nearest whole number above the average yield on state money for the prior year (excluding pension fund investments).[38] Providers may now recover interest in the event of an erroneous overpayment recovery by the state but only at the rate of interest to the nearest whole number average investment yield for the state (excluding pension fund investments).[39] Thus, the state imposes a two percent interest penalty when the provider is

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30. IND. CODE § 12-15-16-6(c)(5) (Supp. 1995).

31. The Medicaid Utilization Rate is the percentage of inpatient days devoted to the treatment of Medicaid patients. 42 U.S.C. § 1396r(b)(2) (1994).

32. IND. CODE § 12-15-17-1 (Supp. 1995).

33. *Id.* § 12-15-19-1(c); 42 U.S.C. § 1396r-4(g) (1994).

34. IND. CODE § 12-15-15-8(b) (Supp. 1995).

35. *Id.* § 12-15-15-8(a). This rate is updated annually. *Id.* § 12-15-15-8(c).

36. *Id.* § 12-15-15-8(b). The principle also functions in reverse so that hospitals with lower than usual levels of Medicaid inpatient days in 1992 are locked into a lower level of reimbursement until the statute is changed.

37. Thus, regardless of whether a hospital increases or decreases the amount of care it provides to indigents, reimbursement is frozen at the base 1992 level until the law is changed.

38. *Id.* § 12-15-21-3(6). The interest accrues from the date of the overpayment. *Id.*

39. *Id.* § 12-15-21-3(7).

overpaid but does not afford the provider the same benefit when the state underpays.

4. Reimbursement for Emergency Room Screening Services.—Under an addition to the Indiana Code, the Office of Medicaid Policy and Planning ("OMPP") must now pay 100% of the rates payable under the Medicaid fee structure for physician screening services in hospital emergency departments.[40] These payments must be calculated using the same methodology used for all other physicians participating in Medicaid.[41] However, this new payment principle does not apply to persons enrolled in the Medicaid Risk-Based Managed Care Program.[42]

5. Increased Payments Rates for Long Term Care.—Payment for staffing intermediate care, skilled care, ventilator care and extensive care has been increased by fifteen minutes per day.[43] In addition, Medicaid payment rates must include an incentive limited to 115% of the average inflatable allowable per resident day costs, calculated statewide for a given level of care.[44]

6. Medicaid "Anti-Hassle" Program.—In response to widespread complaints from providers describing unnecessary burdens in dealing with Medicaid, the Indiana General Assembly passed legislation designed to reduce "hassles" faced by providers.

a. Additional time for hospitals to appeal notice of program reimbursement, determination of final audit findings, and equivalent determinations.—A hospital now has 180 days from notification to appeal a Notice of Amount of Program Reimbursement ("NPR") under the state Medicaid program instead of the previous requirement to appeal within fifteen days.[45] This change will significantly relieve the time pressure associated with evaluating issues and formulating such appeals.

b. Additional time to adapt to non-rulemaking policy changes.—Other legislation was enacted to give providers better notice of non-rulemaking changes in Medicaid policy. New bulletins or notices concerning a change in the Medicaid program, from OMPP or any contractor of OMPP, are not effective for at least forty-five days after the notice or bulletin is mailed to the affected parties.[46] Additionally, the notice or bulletin must be mailed within five days of the date on the notice or bulletin.[47]

c. Committee review of proposed new IFSSA rules.—The Indiana Family and Social Services Administration ("IFSSA") is now required to obtain approval for

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40. *Id.* § 12-15-15-2.5. This provision relates only to payments for physician services and does not affect hospital reimbursement rates. *Id.*

41. *Id.* § 12-15-15-2.5(b).

42. *Id.* § 12-15-15-2.5(e).

43. *Id.* § 12-15-14-4.

44. *Id.* § 12-15-14-3.

45. *Id.* § 4-21.5-3-7(a)(3)(B). This change also applies to appeal of audit findings and other equivalent determinations. *Id.*

46. *Id.* § 12-15-13-6(a). This law refers to notice or bulletins that are not subject to rulemaking. IND. CODE § 4-22-2-2 (1993).

47. IND. CODE § 12-15-13-6(b) (Supp. 1995).

new rules[48] from a newly created "Family and Social Services Committee."[49] The fifteen committee[50] members are appointed by the Governor and the membership is designed to assure a diverse array of representation and perspectives. None of the committee members can be employees of the executive or legislative branch of the state.[51]

Provider representation is ensured by an expressly reserved position for a director, administrator or officer of a disproportionate share hospital and a separate reserved position for a licensed physician.[52] Another position is set aside for an individual "who shall represent the interests of health care providers" and who serves as a provider on the Medicaid Advisory Committee but is neither a physician nor a representative of a hospital.[53] Four positions are reserved for consumer advocates.[54] Members of the committee are entitled to a copy of the agenda at least forty-eight (48) hours prior to any meeting.[55]

The secretary of IFSSA and the chairperson of the committee have the power to jointly determine that a delay in adopting a rule would immediately threaten the health and welfare of citizens, violate state or federal law, have a substantial fiscal impact on the state (greater than $2,000,000 annually), or result in a forfeiture of federal waivers.[56] In such circumstances, the secretary and the chairperson can proceed with promulgation of the rule, but the rule is still subject to ratification by the committee.[57]

7. Health Finance Commission and Committee.—Another new provision to the Indiana Code creates a Health Finance Commission to study health finance in Indiana.[58] The voting members of the commission are composed of the members of the Senate Planning and Public Services Committee and the House Public Health Committee.[59]

To assist the Commission, a Health Finance Advisory Committee is also created.[60] This Committee is to advise the Commission and may perform some duties of the Commission, but members of the Committee may not vote on

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48. *Id.* § 12-8-1-9.

49. *Id.* § 12-8-3-2.

50. The committee has 15 voting members. *Id.* § 12-8-3-3(a). There are a variety of non-voting members. *Id.* § 12-8-3-3(b).

51. *Id.* § 12-8-3-3(a).

52. *Id.*

53. *Id.* This provision seems designed to offer a position on the committee to a nursing home representative, chiropractor, optometrist, nurse or other health care provider currently represented on the Medicaid Advisory Committee.

54. *Id.*

55. *Id.* § 12-8-3-3(d).

56. *Id.* § 12-8-3-4.2(a).

57. *Id.* § 12-8-3-4.2(c)-(e).

58. *Id.* § 2-5-23.

59. *Id.* § 2-5-23-5.

60. *Id.* § 2-5-23-6.

Commission matters.[61] Members of the Committee are appointed from the general public, but must consist of representatives from cost accounting, actuary, medical economics, insurance, long-term care, hospital, mental health, pharmacy, physician, nurse, and community health fields.[62] In addition, the Dean of the Medical School at Indiana University or a representative must be appointed to the Committee.[63]

To further assist the Commission, the Health Policy Advisory Committee is established effective May 1, 1997.[64] At the request of the Commission chairman, this Committee provides information and otherwise assists the Commission in performing its duties.[65] The Health Policy Advisory Committee members will be appointed from the general public and will represent a diverse array of interests provided for in the amended statute.[66]

B. Major Medicare Judicial Decision Affecting Use of GAAP

In *Shalala v. Guernsey Memorial Hospital*,[67] the United States Supreme Court handed down a five to four decision of considerable import to many hospital providers nationwide. The issue involved whether Medicare regulations require the Health Care Financing Administration ("HCFA") to reimburse according to generally accepted accounting principles ("GAAP") or to go through the formal rule-making process for any exceptions to GAAP affecting Medicare reimbursement.[68] The plaintiffs in *Guernsey* presented legal arguments identical to those presented through an Indiana Hospital Association sponsored Medicare group appeal on the same issue.[69] The *Guernsey* decision effectively led to the dismissal of this group appeal.[70]

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* § 2-5-23-8.

65. *Id.*

66. *Id.* Interests in each of the following must be represented: public hospitals, community mental health centers, community health centers, the long term care industry, health care professionals, rural hospitals, health maintenance organizations, for-profit health care facilities, a statewide consumer organization, a statewide senior citizens' organization, a statewide organization representing people with disabilities, organized labor, businesses that purchase health insurance policies, businesses that provide self-funded employee benefit plans, a minority community, the uninsured (this member must be "chronically uninsured" and an individual "who is not associated with any organization, business, or profession represented in this subsection other than as a consumer"). *Id.*

67. 115 S. Ct. 1232 (1995).

68. *Id.* at 1234.

69. *See* Letter From Indiana Hospital Association General Counsel to Chief Executive Officers, *IHA-Sponsored Medicare Group Appeal Loss on Advance Refunding of Bonds* (Nov. 24, 1995) (on file with author).

70. *See* Minutes of IHA-Sponsored Medicare Group Appeals Steering Committee Meeting

In 1972, Guernsey Memorial Hospital ("Hospital") issued bonds for capital improvements and in 1985 spent $672,581 to refinance the bonds.[71] The Hospital expensed this full amount as a cost in the year it occurred. The Court did not dispute that this treatment of the transaction cost was consistent with GAAP principles.[72] However, the Hospital's treatment was inconsistent with non-regulatory reimbursement guidelines published in the *Medicare Provider Reimbursement Manual* ("PRM") section 233, which requires amortization of refinancing costs associated with bonds.[73] The Hospital argued that this informal guideline was inconsistent with regulations that mandated GAAP be utilized by providers participating in the Medicare program.[74]

The federal regulation applicable to this issue, 42 C.F.R. section 413.20(a), does not specifically mention GAAP, but does mandate that "[s]tandardized definitions, accounting statistics and reporting practices that are widely accepted in the hospital and related fields are followed."[75] The Hospital also argued that part (b) of the regulation mandated an accrual basis of accounting and that this had the effect of requiring the use of GAAP except when directly contradicted by another regulation. The Hospital and the dissenters argued that HCFA was authorized to promulgate a regulation, with appropriate notice and comment, that supplanted GAAP[76] but could not impose, by informal guidelines, a policy that conflicts with regulations without the notice and comment required of a regulatory change.[77] Thus, the issue decided was not the substance of the policy itself, but rather whether such a policy could be adopted by HCFA as a guideline without the public notice or comment required for a properly promulgated regulation.[78]

The five to four majority decision assumed arguendo that "the standardized

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(May 19, 1995) (on file with author).

71. *Guernsey Memorial Hosp.*, 115 S. Ct. at 1234.

72. *Id.* at 1235.

73. *Provider Reimbursement Manual* § 233 provides that "[d]ebt issue costs from refunding of debt must be amortized from the date the debt is incurred to the scheduled maturity of the debt." *Allowable Cost (Prov. Reimb. Man., Part 1, § 233.3)*, 1 Medicare and Medicaid Guide (CCH) ¶ 5184 (October 20, 1994).

74. *Guernsey Memorial Hosp.*, 115 S. Ct. at 1235.

75. *Id.* (quoting 42 C.F.R. § 413.20(a) (1993)).

76. Justice O'Connor in her dissent was quite clear that the policies and rationale behind PRM § 233 were sound. "I do not doubt that the amortization approach embodied in PRM § 233 'squares with economic reality,' and would likely be upheld as a rational regulation were it properly promulgated." *Id.* at 1244 (O'Connor, J., dissenting) (citation omitted).

77. The Administrative Procedures Act requires that "rule making" procedures include notice and comment opportunities for those affected by the rules. 5 U.S.C. § 553(b) (1994). However, the same section exempts "interpretive rules" from this requirement. *Id.* Interpretive rules merely explain an "'agency's construction of the statutes and rules which it administers.'" Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979) (quoting the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATION PROCEDURE ACT 30, n.3 (1947)).

78. *See supra* note 76 (discussing the dissent's acknowledgment that a properly promulgated regulation would have been upheld).

definitions, accounting statistics, and reporting practices referred to by the regulations refer to GAAP."[79] However, the Court determined that the regulations refer to reporting requirements on hospital providers and not to a principle of reimbursement binding on the Secretary of the United States Department of Health and Human Services and HCFA.[80] In addition, the Court found that PRM section 233 was "a prototypical example of an interpretive rule" that is not subject to notice and comment requirements.[81] The Court considered section 233 consistent with statutory provisions and regulations that require Medicare to bear no more than its appropriate costs[82] and forbade "cross subsidization" of expenses related to non-Medicare patients.[83] Finally, the court noted that GAAP is not a "lucid or encyclopedic set of pre-existing rules" but rather, a difficult source of guidance because no single authority for GAAP rules exists.[84]

The Court's decision in *Shalala v. Guernsey Memorial Hospital* affirmed the efficacy of PRM section 233 for treatment of advance refunding of bond transactions under Medicare and generally deferred to agency discretion to adopt such instructions. The Court's decision has the effect of strengthening the authority of HCFA to implement informal guidelines without having to go through the formal notice and comment requirements normally associated with a regulatory change. Providers challenging these informal guidelines on grounds that the guidelines contradict regulations or GAAP will find *Guernsey* a serious impediment. Conversely, when program guidelines favor the provider's

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79. *Guernsey Memorial Hosp.*, 115 S. Ct. at 1235.

80. "The logical conclusion is that the provisions . . . concern record keeping requirements rather than reimbursement . . . ." *Id.* at 1236. Justice O'Connor in her dissent found little sense in this claim because 42 C.F.R. § 413.20(a) expressly provides that "the methods of determining costs *payable under Medicare*" are the standardized methods that the Court accepts means GAAP. *Id.* at 1242. "It would make little sense to tie cost reporting to cost reimbursement in this manner while simultaneously mandating different accounting systems for each." *Id.*

81. *Guernsey Memorial Hosp.*, 115 S. Ct. at 1239. Justice O'Connor's dissent dismissed this argument because "PRM § 233 cannot be a valid 'interpretation' of the Medicare regulations because it clearly is at odds with the meaning of § 413.20 [the regulation] itself." *Id.* at 1243. O'Connor argued that the regulation set a "default rule" favoring GAAP that could then only be overcome by an equivalent regulation providing an exception to the default rule. *Id.* at 1241. As O'Connor put it, "interpretive rules . . . must *explain* existing law and not *contradict* what the regulations require." *Id.* at 1244.

82. *See* 42 U.S.C. § 1395x(v)(1)(A)(i) (1994).

83. *Guernsey Memorial Hosp.*, 115 S. Ct. at 1238. O'Connor's dissent points out that the Court provides no support for the claim that immediate recognition of the advance refunding losses would violate the ban on cross subsidization in the statute. *Id.* at 1244. In fact, testimony and GAAP may suggest otherwise. *Id.* at 1245. Acknowledging that reasonable people can disagree on the point, O'Connor argues that because the statute is silent on the issue the cross subsidization argument is inappropriate. *Id.*

84. *Id.* at 1239. In dissent, O'Connor pointed out that the Secretary had changed her view which had previously concluded that 42 C.F.R. § 413.20 required Medicare reimbursement according to GAAP when that construction was to the Secretary's benefit. *Id.* at 1242.

assertions, the provider can cite guidelines with greater certainty knowing that they will be viewed as binding.

C. Administrative Actions

1. Medicare Fiscal Intermediary Treatment of Ancillary Outpatient Supplies.—Indiana's Medicare Fiscal Intermediary, AdminaStar Federal ("AdminaStar"), acted in 1995 to stop hospitals from continuing the long standing practice of separately billing ancillary outpatient supplies. AdminaStar took the position that routine supplies were not separately billable and that only "non-routine" supplies could be separately billed.[85] This action caused considerable confusion among hospitals during 1995 as AdminaStar and the Indiana Hospital Association sought to develop acceptable definitions of "routine" and "non-routine." Previously, hospitals considered "non-routine" to be defined by industry practice or custom.[86] AdminaStar took the position that hospitals had customarily and separately billed for most supplies used in a billable setting no matter how common or routine the use of this supply was. AdminaStar then borrowed nursing home guidelines from the *Provider Reimbursement Manual* to define "routine," although these guidelines had been used to define "routine supplies" in a somewhat different healthcare setting.[87]

On June 1, 1995, AdminaStar published five questions, all of which had to be answered "yes" in order for a supply to be considered non-routine and separately billable.[88] These questions made it virtually impossible for any supply to be viewed as "non-routine" because one question provided that if a supply was available for patients for the diagnosis or procedure involved, it was thereby "routine" and not separately billable.[89] In response, the Indiana Hospital

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85. *See* ADMINASTAR FEDERAL, MEDICARE PART A BULLETIN, NO. 95-05-02 (May 11, 1995).

86. This position was reasonable. The *Provider Reimbursement Manual* defines separately billable ancillary services as "special items and services for which charges are customarily made in addition to a routine service charge." *Ancillary Services (Prov. Reimb. Man., Part 1, § 2202.8)*, 2 Medicare & Medicaid Guide (CCH) ¶ 6105 (Aug 13, 1993).

87. AdminaStar expressly cited PRM § 2203.2 as the basis for its definition of non-routine. This provision defines non-routine supplies as "those that are directly identifiable to individual patients, furnished at the direction of a physician, and . . . not reusable." *Ancillary Services in SNFs (Prov. Reimb. Man., Part 1, § 2203.2)*, 2 Medicare & Medicaid Guide (CCH) ¶ 6157 (June 1, 1993). This section of the PRM is explicitly labeled "Ancillary Services in SNFs." *Id.* In using SNF Guidelines for its definition of "routine" that would apply to hospitals, AdminaStar failed to consider that the same Guidelines in discussing routine services expressly note that "[h]ospitals and most SNF's differ historically in their charging practices and method of providing services." *Routine Services in SNF's (Prov. Reimb. Man., Part 1, § 2203.1)*, 2 Medicare & Medicaid Guide (CCH) ¶ 6155 (Jan. 1990).

88. ADMINASTAR, MEDICARE PART A BULLETIN, NO. 95-06-01 (June 1, 1995).

89. Question Number 4 asked: "Is the item not commonly available for use by patients as needed in the billed setting." *Id.* Thus, because of this question, even an item that was only rarely

Association began a group initiative on behalf of its member Indiana hospitals to negotiate a more reasonable and realistic definition of a "routine" supply.[90] The result was a revised four question test that met many of the objections of Indiana hospitals, provided considerable flexibility for individual institutions, and still gave AdminaStar a meaningful definition of "routine." However, many hospitals will have to change certain billing practices. The revised four question test requires that all of the following be answered "yes" in order for the supply to be "non-routine" and therefore separately billable:[91]

First, is the item medically necessary and furnished at the direction of a physician? (Not a personal convenience item such as slippers, powder, lotion, etc.) This question merely restates the long standing requirement that care be medically necessary to qualify for reimbursement.[92]

Second, is the item used specifically for or on the patient? (Not gowns, gloves, or masks used by staff or oxygen itself available but not specifically used by the patient.) This question conveys the idea that the supply must be one that is actually used by and consumed by the patient. In addition, the item must be actually used on the patient and cannot be something that was available for use but not actually used. Thus, oxygen or other consumables available but not used cannot be separately billed. However, oxygen actually used by the patient would be billable if otherwise qualified.

Third, is the item not ordinarily used for or on most patients or was the volume or quantity used for or on the patient significantly greater than that used for or on most patients in the billed setting? (Not pressure cuffs, thermometers, patient gowns, soap.) This question is at the heart of defining routine and nonroutine supplies. It leaves considerable flexibility for hospitals to apply the definition to best reflect the practices of their facilities. A nonroutine use can occur either because the use of the item itself in the billed setting is unusual or because the amount used was substantially more than usual. The term "not ordinarily used" is not precisely defined. At a minimum, it means a use common to less than half the patients in the billed setting and probably should only be answered "yes" when substantially fewer than half the patients use the supply (or use it in the quantity ordinarily consumed).[93]

Fourth, is the item not basically a stock (bulk) supply in the billed setting and

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used on patients but was simply available for use would be viewed as routine and not separately billable.

90. *See* Letter From Indiana Hospital Association General Counsel to Chief Executive Officers, *New Medicare IHA-Sponsored Group Initiatives* (June 7, 1995) (on file with author).

91. ADMINASTAR FEDERAL, MEDICARE PART A BULLETIN, NO. 95-10-12 (Oct. 17, 1995).

92. "[N]o payment may be made under part A or part B of this subchapter for any expenses incurred for items or services—

(1)(A) which . . . are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." 42 U.S.C. § 1395y(a) (1994).

93. *See* Letter From Indiana Hospital Association General Counsel to Chief Executive Officers, *Revised Medicare Ancillary Outpatient Supplies Policy* (Nov. 6, 1995) (on file with author).

the amount or volume used not typically measured or traceable to the individual patient for billing purposes? (Not pads, drapes, cotton balls, urinals, bedpans, wipes, irrigation solutions, ice bags, IV tubing, pillows, towels, bed linen, diapers, soap, tourniquets, gauze, prep kits, oxygen masks and oxygen supplies, or syringes.) This question is designed to exclude items that are generally stored in bulk and typically not traceable to an individual patient for billing purposes. For example, hospitals keep quantities of soap on hand but do not generally keep track of how much soap an individual patient uses. This question is primarily directed at relatively inexpensive items that the facility keeps available in large amounts. Such items should be included in the general charge for the billed setting and not separately billed.

All four of these questions must be answered "yes" for the item to be separately billable. Note, however, that just because something cannot be separately billed does not mean that its cost cannot be recovered. Hospitals may bundle the expenses associated with routine supplies into the basic rate for the billed setting or otherwise chargeable procedures. Some facilities may be required to raise billed setting rates as charge masters are changed to reflect the bundling of these supply costs into the general rate for the billed setting.

An important element helping to clarify use of the new criteria is the concept of the "billed setting." AdminaStar has not defined billed settings because individual hospitals must define their own billed settings. This is in recognition of the uniqueness of services at acute care facilities. Generally, a billed setting will be the cost center that is the source of the billing rate. For example, an emergency room with its basic rate for an emergency visit would be a billed setting. The criteria as applied to supplies within the emergency room billed setting may apply differently than in another billed setting of the same hospital. As long as hospitals use common, prudent billing practices, and follow other Medicare cost apportionment principles, they may define "billed setting" in a manner that best describes their facility.[94] Bundling supply charges into the general rate for the billed setting may result in a higher general rate for that billed setting.[95] In addition, AdminaStar has agreed to consider the effects of this new policy when matching costs for the lesser of cost or charges for evaluation purposes.[96] AdminaStar has agreed to consider that the Medicare rate for the general setting may be higher than the private payer rate for the same billed setting as long as the Medicare rate includes routine supply costs while the private payer rate may have such supplies unbundled from the general rate.[97]

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94. *Id.*

95. *See* Health Financial Managers Association (HFMA), Supply Questions and Answers, Answer to Question No.27, at the Indiana University Conference Place (June 12, 1995) (on file with author).

96. Medicare will only pay the lesser of reasonable costs or customary charges made by the provider for the same services. 42 C.F.R. § 413.13(b) (1994). Thus if a provider is customarily charging private payers less than its Medicare costs, the provider runs the risk of Medicare reimbursing at the lower customary charge rate.

97. Telephone Interview with Dennis Brinker, CFO and Vice President of Intermediary

2. U.S. Department of Justice Initiatives Under the False Claims Act.—Two initiatives by the United States Department of Justice ("DOJ") exemplify a growing enforcement trend to use the Federal False Claims Act in cases involving alleged improper Medicare reimbursements to providers.

a. Following consultants' advice can result in government investigation.—The government has filed a False Claims Act[98] suit against Harry Metzinger and William Ritter, consultants who provided advice on Medicare reimbursement coding for outpatient laboratory services to hospitals.[99] The government claims that the consultants instructed hospitals to submit improper claims, thereby defrauding the Government.[100] The DOJ has sent letters to approximately 200 hospitals nationwide who used the advice of Metzinger and Ritter, threatening these hospitals with False Claims Act actions as well.[101]

b. DOJ claims Medicare "72-Hour Window Rule" widely violated.—As broad as the DOJ's False Claims Act threats against 200 hospitals in the Metzinger case may seem, it pales in comparison to the ongoing DOJ action that threatens nearly every hospital in the nation with False Claims Act violations regarding the so-called "72-Hour Window Rule." This Medicare rule requires that the costs of all outpatient care related to and within three days of a hospital admission be included in the Diagnostic Related Group payment for the inpatient care if the prior outpatient services were provided by the admitting hospital or by an entity wholly owned or operated by that hospital.[102] The government intends to make allegations that approximately 4,600 hospitals nationwide violated this rule.[103]

Pennsylvania hospitals were the first target of the DOJ's investigation into this

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Operations, AdminaStar Federal, Inc. (Nov. 28, 1995).

98. The False Claims Act permits a civil action by the government against anyone knowingly presenting a false claim to the government. 31 U.S.C. § 3729(a) (1994). "Knowingly" is broadly defined as actual knowledge, deliberate ignorance of the truth, or reckless disregard for the truth. *Id.* § 3729(b). The Act contains punitive damages for those found liable, including triple actual damages to the government and a minimum of $5,000 (a maximum of $10,000) *per claim* in statutory punitive damages. *Id.* § 3729(a). Thus, hospitals with potentially hundreds of small dollar laboratory claims can face enormous penalties even though the dollar figure for actual overpayments may be relatively small.

99. *Government Files False Claims Against Medicare Consultants and Warns Hospitals of Possible Claims Against Them for Following Consultant's Advice*, REIMBURSEMENT ADVISOR (Dennis Berry ed.), Feb. 1995, at 3.

100. *Id.*

101. *Id.* The Indiana hospitals involved were required by the DOJ to waive any defense under the Statute of Limitations and to conduct extensive audits by an independent auditor in order to avoid immediate legal action by the DOJ. Even so, the DOJ still retains the option of joining the hospitals as defendants depending upon the results of the audit and upon how forthcoming the hospitals are in their cooperation with the DOJ.

102. 42 U.S.C. § 1395ww(a)(4) (1994); 42 C.F.R. § 412.2(c)(5) (1994).

103. *Government offers settlement of "DRG payment window" false claims allegations*, REIMBURSEMENT ADVISOR (Dennis Berry ed.) Sept. 1995, at 1 [hereinafter *Government Offers Settlement*].

practice and the DOJ reached a group settlement with approximately 180 Pennsylvania hospitals that could produce about $3,400,000 in refunds and penalties to the government for overpayments.[104] The Pennsylvania settlement offer placed hospitals in three tiers of culpability with increased penalties for each tier.[105] The DOJ claims that 113 Indiana hospitals have violated the 72-Hour Window Rule and that application of a settlement agreement similar to the one in Pennsylvania would result in $2,251,102 in refunds and penalties to the federal government from Indiana alone.[106] The Indiana Hospital Association has reacted by organizing a group initiative to defend against the DOJ action and to negotiate a settlement agreement.[107]

c. Hospitals should consider implementing a corporate compliance

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104. OFFICE OF THE INSPECTOR GENERAL, STATUS REPORT—OFFICE OF INSPECTOR GENERAL/DEPARTMENT OF JUSTICE JOINT PROJECT—MEDICARE NONPHYSICIAN OUTPATIENT BILLS SUBMITTED BY HOSPITALS, A-03-94-00021, at 2 (Aug. 1995) [hereinafter STATUS REPORT]. This report justifies the overwhelming DOJ initiative on grounds that prior Inspector General reports found improper billings under the rule and that the problem continues. *Id.* However, the prior Inspector General reports found that the causes of the improper billings were "clerical errors and misinterpretation of regulation" and never suggested that the problem was caused by hospitals intentionally acting in violation of the False Claims Act. OFFICE OF THE INSPECTOR GENERAL, EXPANSION OF THE DIAGNOSIS RELATED GROUP PAYMENT WINDOW, A-01-92-00521, at i (July 1994). This report also noted that there had been improvement over time. *Id.* at 7. The report cited by the DOJ recommended that the HCFA take certain actions to correct the problem that the HCFA refused to adopt. *Id.* at 13-16. Finally, case law indicates that courts are unlikely to find False Claims Act liability where health care providers are merely following industry practice. *See* Michael M. Mustokoff, How to Prevent an Erroneous Hospital Bill From Becoming a Federal Case, Presentation at the Healthcare Financial Management Educational Foundation "Rapid Response Program," "Settling with the Department of Justice, Pay; Fight; OR . . ." (Oct. 6, 1995) (unpublished, on file with author); *see also* United States v. Krizek, 859 F. Supp. 5, 10 (D.D.C. 1994) (refusing to impose False Claims Act liability where the practice in question was a common industry practice and strongly condemning the government's position as "not rational" and unfair to a medical community "which for the most part is made up of honorable and dedicated professionals"). None of this has stopped the DOJ from vigorous enforcement of the False Claims Act, and the substantial damages that flow from it for small dollar claims violations, to force hospitals into submission and monetary settlements. In fact, even hospitals that paid back claims because of previous OIG audits are being advised by the DOJ that they may still be liable for those same claims as the previous payback did not extinguish liability under the False Claims Act. *Government threatens false claims suits in seeking settlements on alleged DRG payment window violations*, REIMBURSEMENT ADVISOR (Dennis Berry ed.), Feb. 1995, at 1.

105. *See Government Offers Settlement*, *supra* note 103. The tiers range from simple payback with interest for the least culpable to paybacks with a penalty of 100% for the most culpable. *Id.*

106. *See* STATUS REPORT, *supra* note 104, at 7. The DOJ's estimates of financial exposure also illustrate the enormous risks hospitals face in defending False Claims Act allegations in court. This settlement amount of $2,251,102 for Indiana hospitals, which includes some penalties, could amount to nearly $200 million of exposure under the False Claims Act. *Id.*

107. *See* Letter From Indiana Hospital Association General Counsel, *supra* note 90.

program.—The ongoing Metzinger and 72-Hour Window Rule initiatives by the DOJ illustrate a new government approach to dealing with alleged improper payments under Medicare. Previously, Medicare overpayments were generally handled by a repayment (sometimes with interest) of the overpayment amount. The government's new approach is to use or threaten to use the False Claims Act and seek not only payback, but substantial monetary penalties against providers. This enforcement approach suggests that hospitals and others should consider implementing a Corporate Compliance Program to reduce exposure to the False Claims Act.[108]

Significantly, the DOJ settlement offer in the 72-Hour Window Rule case includes substantial compliance requirements on hospitals that, if implemented, would provide them with a "safe harbor" against future inadvertent violations.[109] A comprehensive Corporate Compliance Program can serve as evidence that the hospital did not act with the reckless disregard for the truth that is required for liability under the False Claims Act.[110] One approach to corporate compliance is to view the government as another customer. Such an approach would integrate a Corporate Compliance Program, focused on avoiding violations of government requirements that could lead to significant financial liability or even allegations of fraud, into existing Total Quality Management or other quality assurance programs.

III. PROVIDER LIABILITY

Provider liability cases deal with the statute of limitations for acts of medical malpractice committed on minors, loss of chance, failure to prosecute, intentional torts, roles and responsibilities of physicians, and fraudulent concealment.

A. Judicial Opinions

1. Statute of Limitations: Acts of Medical Malpractice Committed on Minors.—Perhaps the two most important decisions of 1995 in the area of provider liability/medical malpractice were *Cundiff v. Daviess County Hospital*[111] and *Ledbetter v. Hunter.*[112] Both cases involve constitutional challenges to the

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108. *See* Letter From Indiana Hospital Association General Counsel to Chief Executive Officers, Proposed Settlement of DOJ Outpatient Billing/False Claims Enforcement Action Includes Safe Harbor Protection for Hospitals (Aug. 11, 1995) (on file with author).

109. *Id.*

110. *See* DAVID D. QUEEN & ELIZABETH E. FRASHER, DESIGNING A HEALTH CARE CORPORATE COMPLIANCE PROGRAM 29-31 (1995). A Corporate Compliance Program is simply a program that systematically and comprehensively attempts to ensure that an organization is in compliance with the law. *See id* at 29. *See also* Mustokoff, *supra* note 104, at 6 (noting that "An internal compliance program may be insurance against a charge of recklessness").

111. 656 N.E.2d 298 (Ind. Ct. App. 1995). *Cundiff* is presently on appeal to the Indiana Supreme Court.

112. 652 N.E.2d 543 (Ind. Ct. App. 1995). *Ledbetter* was reversed and remanded to the trial court for reconsideration in light of recent pronouncement by Indiana Supreme Court that the Equal

Indiana Medical Malpractice Act ("Act")[113] statute of limitations as it applies to minors.[114] Pursuant to the Act, a minor's claim for medical malpractice must be brought within two years of the act of malpractice, or by the minor's eighth birthday, whichever is later.[115] However, Indiana's general legal disability tolling statute[116] provides that causes of action must be brought within two years after the disability is removed. Persons under the age of eighteen in Indiana are considered under a legal disability.[117] Unfortunately, as of the writing of this Article, neither *Cundiff* nor *Ledbetter* provides a definitive answer as to whether this limitation applicable to minors is constitutional under the Indiana Constitution.

a. Ledbetter v. Hunter.—In *Ledbetter*,[118] Trena Ledbetter alleged medical malpractice in connection with the birth of her child on November 25, 1974.[119] Almost twenty years later, on April 22, 1994, Ledbetter filed a medical malpractice claim contending it was timely filed within two (2) years of her child's eighteenth birthday as provided by the Indiana general legal disability tolling provision.[120] The defendant health care providers moved to dismiss Ledbetter's claim alleging it was barred by the Act's statute of limitations which was controlling in areas of medical malpractice.[121] The trial court granted defendant's motion.[122]

On appeal, Ledbetter argued that the Act's statute of limitations tolling provision for minors violated her due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Indiana Constitution[123] and her equal protection rights as guaranteed by the

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Protection Clause of the Fourteenth Amendment to the United States Constitution and the Privileges and Immunities Clause of the Indiana Constitution are to be given independent interpretation and application.

113. IND. CODE § 27-12-1-1 (Supp. 1995). The term "Act" as used throughout this section will refer to the Indiana Medical Malpractice Act.

114. *Id.* § 27-12-7-1(b).

115. *Id.* The statute provides:

> A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided unless the claim is filed within two (2) years after the date of the alleged act, omission or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.

116. IND. CODE § 34-1-2-5 (1993).

117. IND. CODE § 1-1-4-5 (Supp. 1995).

118. 652 N.E.2d 543 (Ind. Ct. App. 1995); *see also supra* note 112 and accompanying text.

119. *Ledbetter*, 652 N.E.2d at 545.

120. IND. CODE § 34-1-2-5 (1993) provides: "Any person being under legal disabilities when the cause of action accrues may bring his action within two (2) years after the disability is removed." The applicable definition of legal disability "includes persons less than eighteen (18) years of age, mentally incompetent, or out of the United States." IND. CODE § 1-1-4-5 (Supp. 1995).

121. *Ledbetter*, 652 N.E.2d at 545.

122. *Id.*

123. The Due Process Clause of the Fourteenth Amendment to the United States Constitution

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 32 of the Indiana Constitution.[124]

On appeal, Judge Kirsch, writing for a unanimous court, affirmed the Act's tolling provision against federal due process and equal protection attack on the theory that the Indiana Supreme Court's decision in *Johnson v. St. Vincent Hospital, Inc.*[125] bound the court in its determination of plaintiff's federal due process and equal protection claims.[126]

In *Johnson,* the court found that the purposes of the Act's statute of limitations as to minors are furthered in a rational manner by limiting the legal disability of infants to those under six years and that the classification of those entitled to legal disability by age and type of claim bears a fair and substantial relationship to the same end.[127] *Ledbetter* did not find *Johnson* dispositive on the question of whether the Act's tolling provision as to minors violated the provisions of Article I, Section 32 of the Indiana Constitution. The court found that *Johnson* was no longer dispositive on this issue when read in light of the Indiana Supreme Court's recent holding in *Collins v. Day.*[128] In *Collins*, the court stated that there is no reason why state law "equal protection" claims have to be analyzed under the same framework as those involving the federal constitution.[129] As a result, the *Ledbetter* court elected to remand and reverse the case to the trial court for consideration of the impact of *Collins* on the Indiana Medical Malpractice Act.[130] At the time of this writing, the case is still on remand at the trial level.

b. Cundiff v. Daviess County Hospital.—Unfortunately, the constitutional questions left remaining from *Johnson* were not answered by the court's holding in *Cundiff.*[131] Michael Cundiff was born on September 7, 1982. Shortly after his birth, Michael developed pneumonia. Michael's hospital records reflect that he was given an overdose of the antibiotic Kanamycin.[132]

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provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Article I, Section 12 of the Indiana Constitution provides: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely; and without denial; speedily, and without delay." IND. CONST. art. I, § 12.

124. The Equal Protection Clause of the Fourteenth Amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Article I, Section 32 of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 32.

125. 404 N.E.2d 585 (Ind. 1980).

126. *Ledbetter*, 652 N.E.2d at 545, 548.

127. *Johnson*, 404 N.E.2d at 604.

128. 644 N.E.2d 72 (Ind. 1994).

129. *Id.* at 78-80.

130. *Ledbetter*, 652 N.E.2d at 544.

131. Cundiff v. Daviess County Hosp., 656 N.E.2d 298 (Ind. Ct. App. 1995).

132. *Id.* at 300.

On August 9, 1993, Michael was adopted by Charles and Betty Cundiff, who noticed, as Michael continued to grow, that he was not developing normally. They later discovered that he was mentally retarded, had high frequency hearing loss, and a speech impediment.[133]

In December of 1990, three months after Michael's eighth birthday, the Cundiffs were advised by Michael's doctors that the overdose of Kanamycin possibly caused Michael's hearing loss.[134] Almost three years later, on September 21, 1993, the Cundiffs filed a proposed complaint for damages before the Indiana Department of Insurance, on Michael's behalf, alleging acts of medical malpractice.[135]

Like the defendant in *Johnson*, the hospital filed a motion for summary judgment alleging the complaint was barred by the Act's statute of limitations. The motion was granted by the trial court.[136] With the benefit of the *Ledbetter* decision, the *Cundiff* court found *Johnson* dispositive as to plaintiffs' federal claims and not dispositive as to plaintiffs' state privileges and immunities claims.[137]

Cundiff is noteworthy nonetheless for suggesting what analysis will be used to determine if the Act's tolling statute will withstand the state constitutional challenge.[138] In *Collins,* the court stated that legislation must meet three criteria to survive constitutional challenge.[139] First, the legislation must be reasonably related to "inherent characteristics" that are distinctive in the unequally-treated classes; second, preferential treatment which is extended by the state must be uniform in application and availability; and, third, the court must defer to the discretion exercised by the legislature in adopting the limitation.[140] Presently, *Cundiff* is on transfer to the Indiana Supreme Court.

2. Loss of Chance.—The single and most significant pronouncement from the Indiana Supreme Court concerning medical malpractice was made in *Mayhue v. Sparkman.*[141] *Mayhue* involved the alleged failure to timely diagnose cervical cancer. Dr. Mayhue first diagnosed Sparkman with cervical cancer in 1981 and he treated her at that time with a full course of successful radiation therapy.[142] From 1985 until 1989, Sparkman was treated by her family physician, receiving numerous pap smears, none of which indicated the presence of atypical cells.[143]

In May 1989, however, a pap smear indicated the presence of cancer. Sparkman was again referred to Mayhue, who performed a clinical examination

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133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 302.
138. *Id.* at 301-02.
139. Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994).
140. *Id.*
141. 653 N.E.2d 1384 (Ind. 1995).
142. *Id.* at 1385.
143. *Id.*

that revealed the continued presence of a constricting ring within the vagina and atrophic vaginitis.[144] Sparkman informed Mayhue that her family physician told her that her pap smear results were abnormal, but failed to bring a copy of the report to him or to inform him that the test report indicated the returned presence of cancer.[145] Mayhue did perform a pap smear, which reported atypical cells, but did not suggest a recurrent malignancy.[146] Mayhue did not order an additional pap smear or biopsy, believing that the abnormal cells instead were a reaction to her earlier radiation therapy.[147]

In November 1989, Sparkman returned to Mayhue with complaints of pain in the area above the pubic arch and a belief that a lump existed.[148] An ultrasound was ordered and revealed the presence of a uterine tumor.[149] On January 1990, surgery found that the tumor had spread to the point of inoperability. Sparkman died in November 1990.[150]

The medical review panel formed to review this case[151] found that Mayhue did not satisfy the appropriate standard of care, but believed that the care was not the cause of the complained of harm. [152] The evidence submitted revealed that even if Sparkman's cancer would have been diagnosed earlier, she still had less than a fifty percent chance of recovery.[153] Under traditional tort principles, the plaintiff must prove that proper diagnosis and treatment would have prevented the patient's injury or death.[154] In cases such as this one, the court believed that the defendant would always be entitled to summary judgment.[155]

The trial court, however, denied the doctor's motion for summary judgment and a permissive interlocutory appeal was taken to the court of appeals.[156] The appeals court affirmed and adopted a "pure" loss of chance doctrine.[157] The

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144. *Id.* Atrophic vaginitis is the thinning and atrophying of the epithelium (thin skin) of the vagina, usually resulting from diminished endocrine stimulation. It is common in post-menopausal women. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1386.

150. *Id.*

151. IND. CODE § 27-12-9-1 (Supp. 1995). "[N]o action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel . . . and an opinion is rendered by the panel . . . ." *Id.*

152. *Mayhue*, 653 N.E.2d at 1385.

153. *Id.* at 1386.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1387. The "pure" loss of chance doctrine allows the patient to recover for misdiagnosis or mistreatment of a fatal condition by determining that the "compensable injury is not the result, which is usually death, but the reduction in the probability that the patient would recover or obtain better results if the defendant had not been negligent." *Id.*

Indiana Supreme Court granted transfer to review the issue of whether Indiana law recognizes, in medical malpractice claims, a separate loss of chance doctrine.[158]

On review, the supreme court opted for the *Restatement of Torts (Second)*, section 323 view, which reads:

> One who undertakes, gratuitously or for consideration, to render services which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for the physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if, (a) his failure to exercise such care increases the risk of harm . . . .[159]

While section 323 liability for misdiagnosis of a potentially fatal condition reads very similar to the pure loss of chance doctrine, the supreme court did not view it that way. Instead, the supreme court believed section 323 to be more procedural than substantive.[160] "Specifically," the supreme court stated, "once the plaintiff proves negligence and an increase in the risk of harm, the jury is permitted to decide whether the medical negligence was a substantial factor in causing the harm suffered by plaintiff."[161] This means that if there is sufficient proof of negligence and a resulting increase in the possibility of death or other harm, the jury may then decide the proximate causation question. To the court, "when Section 323 governs a case, it permits the plaintiff to avoid summary judgment on the issue of proximate cause even when there was a less than 50 percent chance of recovery absent the negligence."[162] The measure of damages as between section 323 and pure loss of chance should remain the same: the loss of the chance of recovery, but not the result that ultimately did occur.

3. Dismissal for Failure to Prosecute.—In *Rivers v. Methodist Hospitals, Inc.*,[163] the court held that the failure to participate in meaningful discovery or to assist in the formation of the medical review panel or prosecution of the case may

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158. *Id.* at 1389.

159. *Id.* at 1388.

160. *Id.*

161. *Id.*

162. *Id.*

> We think in those situations where a health care provider deprives a patient of a significant chance for recovery by negligently failing to provide medical treatment, the health care professional should not be allowed to come in after the fact and allege that the result was inevitable inasmuch as that person put the patient's chance beyond the possibility of realization. Health care providers should not be given the benefit of uncertainty created by their own negligent conduct. To hold otherwise would in effect allow care providers to evade liability for their negligent actions or inaction in situations in which patients would not necessarily have survived or recovered, but still had a significant chance of survival or recovery.

Id.

163. 654 N.E.2d 811 (Ind. Ct. App. 1995).

warrant dismissal of the action.[164] *Rivers* discusses the plaintiff's obligation to assist in panel formation as one of the factors to be considered in imposing sanctions for delay and nonresponsiveness. In this regard, *Rivers* should probably be seen as an extension of *Galindo v. Christensen* [165] and *Ground v. Methodist Hospital of Indiana, Inc.*, [166] both courts held that the failure to make a timely submission to the medical review panel can subject the plaintiff to dismissal. The *Rivers* court wrote:

> Since the Doctors' request for the formation of a medical review panel, Rivers has failed to participate in the selection of a panel chair or formation of a review panel. The Doctors twice asked Rivers if they could agree upon a panel chair and even delineated various local attorneys they found acceptable to serve as panel chairman. Rivers failed to respond to the Doctors. Although Rivers correctly notes Indiana Code § 27-12-10-4 allows for either party to file a request with the clerk of the supreme court to randomly draw a list from which a panel chairman is selected if the parties cannot agree, it is not a defendant's duty to prosecute a plaintiff's cause of action.[167]

Rivers is important simply to point out that the failure to aggressively prosecute one's suit may result in dismissal.

4. Intentional Torts and the Medical Malpractice Act.—In *Doe v. Madison Center Hospital*,[168] the court revisited a problem that occurs often in the area of medical malpractice; that is, whether allegations of an intentional tort fall within the purview of the Medical Malpractice Act.

In *Doe*, a minor psychiatric patient and her mother sued a mental health care facility and a mental health counselor for assault, battery, and intentional infliction of emotional distress, alleging that the counselor coerced sexual intercourse with the patient, resulting in her contracting a venereal disease.[169] The trial court dismissed the action for lack of subject matter jurisdiction[170] on the grounds that the plaintiffs failed to file their complaint with the Indiana Department of Insurance for the acts of medical negligence.[171] Defendant Madison Center Hospital ("Hospital") contended that the claim sounded in medical negligence because the counselor had mishandled the transference phenomenon or that he had acted outside the scope of his employment.[172] The court of appeals reversed, however, finding that the plaintiff's allegations did not fall within the purview of

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164. *Id.* at 811.
165. 569 N.E.2d 702 (Ind. Ct. App. 1991).
166. 576 N.E.2d 611 (Ind. Ct. App. 1991).
167. *Rivers*, 654 N.E.2d at 815.
168. 652 N.E.2d 101 (Ind. Ct. App. 1995).
169. *Id.* at 102.
170. *Id.*
171. *Id.*
172. *Id.*

the Indiana Medical Malpractice Act.[173]

In finding the counselor's actions outside the Medical Malpractice Act, the court, citing *Van Sice v. Sentany,*[174] noted first that the Malpractice Act does not specifically exclude intentional torts from the definition of malpractice.[175] However, the "Act pertains to curative or salutary conduct of a health care provider acting within his or her professional capacity, and is designed to exclude that conduct 'unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill or judgment.'"[176] In other words, the benchmarks of a medical malpractice claim (which must go to a medical review panel) are two-fold: first, the conduct of the defendant must be "curative or salutary"; second, it must involve the health care provider's "exercise of professional expertise, skill or judgment."[177]

The hospital attempted to argue that the location of the incident, a hospital, made the case a Medical Malpractice Act case.[178] The court disagreed, saying that there has to be "some causal connection between the conduct and the nature of the patient-health care provider relationship."[179]

The hospital also argued that the counselor's conduct was based upon his professional services as a mental health counselor and the plaintiff's complaint alleged medical negligence of a therapist where the transference phenomenon is an occupational hazard.[180] The *Doe* court concluded however, that the mishandling or misuse of the transference phenomenon is viable only when a therapist-patient relationship has been established.[181] When the court examined the pleadings and weighed the facts of this case, it concluded that there was no therapist-patient relationship between Doe and the counselor.[182] Absent stronger evidence of a therapeutically-based relationship, the court held, the hospital was not entitled to dismissal.[183]

5. Expert Opinions as to Roles and Responsibilities of Physicians.—In *Simms*

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173. *Id.*

174. 595 N.E.2d 264 (Ind. Ct. App. 1992).

175. Malpractice is a tort based on health care or professional services rendered by a health care provider to a patient. IND. CODE § 27-12-2-18 (Supp. 1995). A tort is "a legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another." *Id.* § 27-12-2-28.

176. *Doe*, 652 N.E.2d at 104 (citing Boruff v. Jesseph, 576 N.E.2d 1297, 1298 (Ind. Ct. App. 1991)) (quoting Collins v. Thakkar, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990)). *See also* IND. CODE § 27-12-2-14 (Supp. 1995) which states: "Coverage for a health care provider qualified under this subdivision is limited to its health care functions and does not extend to other causes of action."

177. *Doe*, 652 N.E.2d at 104.

178. *Id.*

179. *Id.*

180. *Id.* at 105.

181. *Id.* at 106-07.

182. *Id.* at 107. The counselor had previously been employed as a desk clerk, production worker and volunteer at the hospital. *Id.* at 102.

183. *Id.*

v. Schweikher,[184] a case involving an amount in controversy of less than $15,000 and therefore not subjected to review by panel,[185] the patient claimed that a surgical technician placed a hot instrument on her leg causing a third degree burn.[186] Simms filed her claim against Dr. Schweikher alleging vicarious liability for the nurse's act based upon his duty to supervise her.[187] The trial court entered summary judgment in favor of Dr. Schweikher and plaintiff appealed.[188]

"In support of his motion for summary judgment, Dr. Schweikher submitted his own affidavit, stating that his conduct was within the applicable standard of care."[189] Dr. Schweikher also presented an affidavit from the surgical assistant which admitted that her independent act caused plaintiff's injury and that Dr. Schweikher did not control her placement of instruments during the procedure.[190] The plaintiff offered no evidence to rebut these affidavits.[191] In finding for Dr. Schweikher, the court concluded:

> We do not believe that the complex roles and responsibilities of surgeons and hospital staff assisting with surgery are within the common knowledge of laypersons. Without testimony from a medical expert indicating that supervision of surgical staff falls within the standard of care of a surgeon in this or a similar locality, we cannot infer that Dr. Schweikher was negligent by failing to prevent the surgical technician's injurious act.[192]

What is important about *Simms,* however, is that the doctor prevailed because the patient did not raise an inference of negligence due to her failure to provide evidence to rebut the evidence submitted by Dr. Schweikher. In other words, the court did not reach the merits of the plaintiff's legal claim and whether a surgeon may be vicariously liable for the negligent acts of hospital staff assisting in surgical procedures.[193] The court emphasized that its decision was based on the fact that the case was a summary judgment case; the court specifically stated that its holding did not announce a new principle on the issue of whether Dr. Schweikher could be held, as a matter of law, "vicariously liable" for the assistant's acts.[194]

Simms is also important for Judge Barteau's dissent, which suggests that the case could have been decided on grounds of *res ipsa loquitur* or on the "common

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184. 651 N.E.2d 348 (Ind. Ct. App. 1995), *trans. denied.*
185. IND. CODE § 27-12-8-6 (Supp. 1995).
186. *Simms*, 651 N.E.2d at 349.
187. *Id.*
188. *Id.*
189. *Id.* at 350.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at n.3.
194. *Id.*

knowledge" exception to the requirement of expert testimony.[195] Judge Barteau also did not perceive favorably the fact that Dr. Schweikher could act as his own expert, labeling his affidavit "self-serving."[196] Perhaps the most troubling aspect about Judge Barteau's dissent, however, is the fact that it assumes the duty of supervision exists in such situations.[197] This leaves unanswered the question whether, in cases involving surgery, the surgeon is always responsible for the acts and omissions of supporting staff irrespective of their respective professional and employment roles.

6. Tolling the Statute of Limitations—Fraudulent Concealment and the Continuing Relationship.—The Indiana Court of Appeals' ruling of *Halbe v. Weinberg* [198] undertakes a comprehensive discussion of the medical malpractice statute of limitations as it applies in breast implant cases. It also contains an important advancement in medical malpractice statute of limitations jurisprudence.

In 1982, Sharon Halbe consulted Dr. Weinberg and was diagnosed with bilateral fibrocystic disease that necessitated a bilateral reduction mammoplasty with subcutaneous mastectomy.[199] The procedure was performed by Dr. Weinberg.[200] From 1982 through 1988, Halbe continued under the care of Dr. Weinberg for various procedures including insertion of two new saline breast implants, resection of a mass, and removal of a lesion on her eyelid.[201] The plaintiff's last visit to Dr. Weinberg was in November 1988.[202]

In January 1992, the plaintiff became aware of media coverage regarding symptoms of other women who had silicone breast implants and attempted to resurrect her relationship with Dr. Weinberg by requesting, and receiving, an order for a xeromammogram.[203] The xeromammogram, although ordered by Dr. Weinberg, was not performed by Dr. Weinberg.[204] The xeromammogram revealed the plaintiff's breast implants contained silicone gel.[205]

In April 1992, the plaintiff instituted legal action against Dr. Weinberg and various manufacturers of breast implants and component parts.[206] In August 1992, the plaintiff amended her complaint and filed a proposed complaint for medical

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195. *Id.* at 350-51 (Barteau, J., dissenting). "[J]uries do not need an expert to help them conclude, say, that it is malpractice to operate by mistake on the wrong limb." *Id.* (quoting Wright v. Carter, 622 N.E.2d 170, 171 (Ind. 1993)).

196. *Id.* at 351.

197. *Id.*

198. 646 N.E.2d 995 (Ind. Ct. App. 1995).

199. *Id.* at 996.

200. *Id.*

201. *Id.* Regarding the implants, Halbe was shown samples of "saline" and "silicone" versions. She chose the saline type implant and the doctor indicated he would use these. *Id.*

202. *Id.*

203. *Id.* A xeromammogram could reveal a leak in the implants.

204. *Id.*

205. *Id.*

206. *Id.*

negligence before the Indiana Department of Insurance.[207] Dr. Weinberg filed his motion for summary judgment including the affirmative defense of the statute of limitations.[208]

On appeal, the court of appeals held that the plaintiff's actions were insufficient to reinstate the doctor-patient relationship.[209] Citing *Weinberg v. Bess,*[210] the court stated "[t]he physician's failure to disclose that which he knows, or in the exercise of reasonable care should have known, constitutes constructive fraud. This constructive fraud terminates at the conclusion of the physician-patient relationship."[211] Noting that although the physician-patient relationship does not necessarily end with the patient's last office visit, Halbe's contention that she continued to rely on Dr. Weinberg for medical care did not create a genuine factual issue.[212]

IV. FEDERAL DEVELOPMENTS

Numerous significant developments in the health care field occurred at the federal level during the 1995 Survey period. Most significantly, the Internal Revenue Service issued proposed guidance with respect to physician recruitment activities by charitable institutions. Other highlights included long awaited regulations implementing the "Stark" legislation[213] and an important case interpreting the Medicare/Medicaid Anti-Kickback statute.[214]

A. Tax

On April 3, 1995, the Internal Revenue Service issued a proposed revenue ruling relating to physician recruitment incentives provided by hospitals exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code.[215] The proposed revenue ruling, issued in the form of Announcement 95-25, details five factual situations of physician recruitment, four of which are not deemed to result in private inurement or excess private benefit, and one of which would result in the hospital losing its tax exempt status.[216]

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207. *Id.*

208. *Id.*

209. *Id.* at 997.

210. 638 N.E.2d 841 (Ind. Ct. App. 1994).

211. *Halbe*, 646 N.E.2d at 997.

212. *Id.* "A patient's bare assertion that she continued to rely upon a physician for medical care is insufficient as a matter of law to create a factual issue." *Id.* (citation omitted).

213. 42 U.S.C. § 1395nn (1994).

214. 42 U.S.C. § 1320a-7b(7) (1994).

215. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, BULLETIN NO. 1995-14, INTERNAL REVENUE BULLETIN, ANNOUNCEMENT 95-25, TAX CONSEQUENCES OF PHYSICIAN RECRUITMENT INCENTIVES PROVIDED BY HOSPITALS DESCRIBED IN SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE 11 (Apr. 13, 1995) [hereinafter I.R.S. ANN. 95-25].

216. *Id.* at 11. Of note is that in October 1994, the IRS entered into a "closing agreement" with Hermann Hospital of Houston, Texas, in lieu of revocation of the hospital's tax exempt status.

In describing the five situations, the specific issue at hand is whether under the facts as described in the proposed revenue ruling a "hospital violates the requirements for exemption from federal income tax as an organization described in Section 501(c)(3) of the Internal Revenue Code when it provides incentives to recruit private practice physicians to join its non-employee medical staff or to provide services on behalf of the hospital."[217] The five scenarios detailed in Announcement 95-25 are summarized as follows:

> (1) A rural hospital located in an area in need of primary medical care professionals (which includes obstetricians and gynecologists) recruits a physician who recently completed an ob/gyn residency to become a non-employee member of the hospital's medical staff. Under a recruitment agreement that is properly documented and bears commercially reasonable terms, the hospital pays the physician a one-time bonus of $5,000, pays the physician's malpractice insurance premium for one year, provides office space at below market rent for three years, a guarantee of a home mortgage and provides start-up financial assistance.
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> (2) A hospital located in an economically depressed inner city area conducts a community needs assessment indicating a shortage of pediatricians, especially for Medicaid patients. The hospital recruits a pediatrician to relocate to the hospital's city, join the medical staff and treat a reasonable number of Medicaid patients. Pursuant to a recruitment agreement negotiated at arm's length, the hospital reimburses the physician for moving expenses and professional liability "tail" coverage for the physician's former practice and guarantees that the physician's private practice income will meet a certain level for three years.

This closing agreement arose as a result of the hospital disclosing to the IRS certain physician recruitment and retention arrangements that raised questions as to whether prohibited inurement and private benefit were conferred upon individuals in violation of the proscriptions contained in section 501(c)(3) of the Internal Revenue Code. This closing agreement set forth guidelines for the hospital to follow when structuring recruitment arrangements that were to be followed for 10 years.

These guidelines are very specific in nature and detail the types of physicians who may be recruited by Hermann Hospital, the types of recruitment incentives which may and may not be offered, and the maximum length of such arrangements. Although not binding on any hospital or other institution except Hermann Hospital, this closing agreement has been closely scrutinized because of the rigid detail found in the recruitment guidelines as well as the IRS' decision to publish the document. In Announcement 95-25, the IRS appears to take a much more flexible approach to physician recruitment. If finalized, the proposed revenue ruling may also benefit Hermann Hospital as the closing agreement states that the recruitment guidelines outlined in the agreement shall be modified to the extent that Congress or the IRS legislatively or administratively, as the case may be, establish different physician recruitment standards for tax-exempt hospitals. *Id.*

217. *Id.*

(3) A hospital located in an economically depressed inner city area conducts a community needs assessment that indicates a shortage of obstetricians for Medicaid and charity care patients. The hospital recruits an obstetrician currently on its medical staff to provide these services and enters into such an agreement. Under the agreement, the hospital agrees to reimburse the physician for the cost of one year's malpractice insurance in return for an agreement by the physician to treat a reasonable number of Medicaid and charity care patients for that year.

(4) A hospital located in a medium to large size metropolitan area operates a neonatal intensive care unit that requires a minimum of four perinatologists to ensure adequate coverage and a high quality of care in the unit. Two of the current four physicians providing such coverage are relocating to other areas. The hospital initiates a search for perinatologists and determines that one of the top two candidates is a physician who is currently practicing at another hospital in the same city. The hospital recruits this physician to join its medical staff and provide coverage for its neonatal intensive care unit pursuant to an agreement negotiated at arm's-length. Under the agreement, the hospital guarantees that the physician's private practice income will meet a certain level for three years.

(5) A hospital located in a medium to large metropolitan area is convicted of violating the Medicare/Medicaid Anti-Kickback statute[218] because it provided recruitment incentives that constituted payments for referrals. The activities resulting in the violations were substantial.

In the proposed revenue ruling, the IRS stated that in order to meet the requirements of section 501(c)(3), a hospital or other tax-exempt organization that provides recruitment incentives to non-employee private practitioners must provide those incentives in a manner that does not cause the organization to violate certain organizational and operational tests outlined in Internal Revenue Code regulations supporting section 501(c)(3).[219] Whether the hospital provides such incentives in a manner that does not cause the organization to violate these tests is determined by evaluating all relevant facts and circumstances. A violation will result from a failure to comply with any of the four requirements described below.

First, the hospital is not to engage in substantial activities that do not further the hospital's exempt purposes or that do not bear a reasonable relationship to the accomplishment of such purposes. In determining whether an organization meets this operational test, the issue is whether the particular activity undertaken by the organization is appropriately in furtherance of the hospital's exempt purpose.[220]

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218. 42 U.S.C. § 1320a-7b(b) (1994).

219. I.R.S. ANN. 95-25, *supra* note 215. *See* Treas. Reg. § 1.501(c)(3)-1 (1995).

220. I.R.S. ANN. 95-25, *supra* note 215. *See also* Rev. Rul. 80-278, 1980-2 C.B. 175; Rev. Rul. 80-279, 1980-2 C.B. 176.

Second, the hospital may not engage in activities that result in inurement of the hospital's net earnings to a private shareholder or individual. An activity may result in such inurement if it is structured as a device to distribute the net earnings of the hospital.[221]

Third, the hospital shall not engage in substantial activities that cause the hospital to be operated for the benefit of a private interest rather than a public one, which would result in a substantial non-exempt purpose.

Fourth and finally, the organization should not engage in substantial unlawful activities, which are inconsistent with charitable purposes.[222]

In reviewing the five recruitment situations, the IRS held in Announcement 95-25 that the hospitals in situations 1, 2, 3 and 4 do not violate the requirements for exemption from federal income taxation as organizations described in section 501(c)(3) as a result of the physician recruitment incentive agreements because the transactions further charitable purposes, do not result in inurement, do not result in the hospitals serving a private rather than a public purpose, and are lawful.[223] In the fifth situation, however, the hospital is not deemed to qualify as a section 501(c)(3) organization because its unlawful physician recruitment activities are inconsistent with charitable purposes.[224]

Overall, it is encouraging that the IRS is issuing guidance for physician recruitment so that tax exempt providers will have greater certainty as to what activities will not jeopardize their exempt status. However, although Announcement 95-25 appears to incorporate some flexibility with respect to physician recruitment activities, the proposed revenue ruling also contains many uncertainties, such as how much a provider may rely on the authority if it has a recruitment situation that varies slightly from one of the favored situations or if it has such a situation that varies greatly but is truly beneficial to the provider's community. Hopefully, the final revenue ruling will answer some of these outstanding issues.

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221. I.R.S. ANN. 95-25, *supra* note 215. *See also* Lorain Avenue Clinic v. Commissioner, 31 T.C. 141 (1958); Birmingham Business College v. Commissioner, 276 F.2d 476 (5th Cir. 1960).

222. I.R.S. ANN. 95-25, *supra* note 215. *See also* Rev. Rul. 75-384, 1975-2 C.B. 204; Rev. Rul. 80-278, 1980-2 C.B. 175; Rev. Rul. 80-279, 1980-2 C.B. 176.

223. I.R.S. ANN. 95-25, *supra* note 215.

224. I.R.S. ANN. 95-25, *supra* note 215. Of note is that in this fifth situation, the hospital in question is located in a medium to large metropolitan area. Under the Medicare/Medicaid Anti-Kickback statute at 42 U.S.C. § 1320a-7b(b), it is not relevant where a person is located for purposes of making illegal inducements for referrals. However, Congress and the United States Department of Health and Human Services have recognized the need for health care providers to locate in rural areas and have issued statutory exceptions and proposed "safe harbor" regulations, respectively, that would allow certain activity, specifically including physician recruitment, to be deemed safe from prosecution under this statute if such activity occurs in a rural area. *See* 42 U.S.C. §1320a-7(b)(3) (1994); 42 C.F.R. §1001.952 (1994).

B. Physician Self-Referral/Fraud and Abuse

1. Stark I Final Regulations.—During the 1995 Survey period, the federal Health Care Financing Administration ("HCFA") issued substantive final regulations[225] implementing section 1877 of the Social Security Act, known as the Ethics in Patient Referrals Act of 1989, or better known as the "Stark I" legislation.[226] Stark I became effective January 1, 1992 and applies to physician referrals for clinical laboratory services to entities in which the physician or one of his or her immediate family members has a financial interest.[227] A separate notice of proposed rulemaking will be published to address the provisions of the Comprehensive Physician Ownership and Referral Act of 1993, or "Stark II," that relate to physician referrals for "designated health services"[228] (including clinical laboratory services) that became effective January 1, 1995. However, in the preamble to the final regulations, HCFA advised that generally the prohibitions and exceptions found in the Stark legislation are drafted so that they apply equally to situations involving referrals for any of the designated health services.[229] Therefore, HCFA will currently rely upon its language and interpretations in the Stark I final regulations when reviewing referrals involving any of the other designated health services under Stark II.[230]

The two pieces of Stark legislation read together with certain amendments to the Social Security Act provide that, with certain exceptions, if a physician or member of a physician's immediate family[231] has a financial relationship with an entity, the physician may not make referrals to the entity for the furnishing of designated health services for which payment may be made under the Medicare/Medicaid programs, and the entity may not present a claim to Medicare/Medicaid or bill any third party payor for such services furnished

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225. 60 Fed. Reg. 41,914 (1995). On March 31, 1995, the United States Department of Health & Human Services Office of Inspector General published a final rule relating to civil money penalties, assessments and exclusions for persons who make a claim for payment for a service rendered pursuant to a referral prohibited by the Stark legislation and for persons who enter into schemes to circumvent the basic statutory prohibitions. *See* 60 Fed. Reg. 16,580 (1995).

226. 42 U.S.C. § 1395nn (1994).

227. *Id.* § 1395nn(a)(1).

228. Under the Stark II legislation, the term "designated health services" includes clinical laboratory services; physical therapy services; occupational therapy services; radiology services, including MRI, CAT scans and ultrasound; radiation therapy services; durable medical equipment; parental and enteral nutrients, equipment and supplies; prosthetics, orthotics and prosthetic devices; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services. *Id.* § 1395nn(h)(6).

229. 60 Fed. Reg. 41,916 (1995).

230. *Id.*

231. The regulations define "immediate family member" to mean husband or wife; natural or adoptive parent, child or sibling; step relatives (parent, child, brother, sister); in-laws (father, mother, son, daughter, brother, sister); grandparent or grandchild; and spouse of a grandparent or grandchild. 60 Fed. Reg. 41,979 (1995).

pursuant to a prohibited referral.[232]

Under the final Stark I regulations, the term "financial relationship" refers to a physician's (or immediate family member's) ownership or investment interest in an entity or compensation arrangement with an entity.[233] Such financial relationships may be held directly or indirectly.[234] However, there are numerous exceptions found in the Stark legislation applicable to such financial relationships.[235] These exceptions apply to (1) both an ownership/investment interest and a compensation arrangement, (2) only an ownership/investment interest, or (3) only a compensation arrangement.[236]

HCFA views the Stark legislation as, for the most part, self implementing.[237] Thus, the final Stark I regulations do not delay any potential enforcement of either Stark I or Stark II except for sanctions that can only be applied as a result of these regulations.[238] In these final Stark I regulations, HCFA essentially incorporates the statutory requirements that are already in effect and attempts to clarify or interpret certain provisions. A few additional exceptions have also been added. Significant developments from the final regulations are described below.

First and foremost, the group practice definition incorporates a percentage threshold for the requirement that "substantially all" of the patient care services provided by the physicians who are members of the group be furnished through the group. This threshold is, in the aggregate, seventy-five percent of the total "patient care services" of the "members of the group." The term "members of the group" is defined to include physician partners, full-time and part-time physician contractors and employees. "Patient care services" are measured by the total patient care time each member spends on these services. For example, if a physician practices forty hours a week and spends thirty hours on patient care services for a group practice, the physician has spent seventy-five percent of his or her time providing countable patient care services.[239]

For purposes of determining whether this threshold is met, a patient care services percentage must be determined for each group member; these percentages are then added together and divided by the number of physicians. Further, group practices will be required to submit written statements to their fiscal intermediaries annually that attest to meeting the seventy-five percent threshold. However, the "substantially all" test does not apply to any group practice located solely in a Health Professional Shortage Area ("HPSA").[240]

Of final note with respect to group practices is that although not explicit in the regulations, HCFA advises in the preamble to the regulations that an entity owned

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232. 42 U.S.C. § 1395nn(a)(1) (1994).
233. 60 Fed. Reg. 41,978 (1995).
234. *Id.*
235. 42 U.S.C. § 1395nn(b)-(d) (1994).
236. *Id.*
237. 60 Fed. Reg. 41,924 (1995).
238. *Id.*
239. 60 Fed. Reg. 41,978 (1995).
240. *Id.*

and operated by physicians and non-physicians may be able to qualify as a group practice, presuming the above described threshold and other requirements are met.[241]

Other important developments from the final regulations pertain to a transaction that involves long-term or installment payments; such an arrangement is not considered an "isolated transaction" for purposes of the isolated transaction compensation arrangement exception.[242] In order to take advantage of this exception, there can be no additional transactions between the parties for six months after the isolated transaction.[243] Thus, it may be necessary to examine other Stark exceptions if an arrangement with a physician or immediate family member of a physician involves installment payments.

In the final regulations, it is important to note that HCFA created a new exception applying to both an ownership/investment interest and a compensation arrangement for services furnished in an ambulatory surgical center ("ASC"), end stage renal disease ("ESRD") facility, or by a hospice, if payment for those services is included in the ASC rate, the ESRD composite rate, or as part of the per diem hospice charge, respectively.[244] Further, ownership in a laboratory located in a rural area is excepted if substantially all of the laboratory tests furnished by the entity are furnished to individuals who reside in a rural area. "Substantially all" means no less than seventy-five percent.[245]

An ownership or investment interest in a hospital will not implicate Stark if the referring physician is authorized to perform services at the hospital and the ownership or investment interest is in the entire hospital and not merely in a distinct part or department of the hospital.[246] The regulations define "hospital" as any separate legally organized operating entity plus any subsidiary, related, or other entities that perform services for the hospital's patients and for which the hospital bills. A "hospital" does not include entities that perform services for hospital patients "under arrangement" with the hospital.[247]

A significant exception in the Stark legislation was clarified by the regulations. This exception for both ownership/investment interests and compensation arrangements applies to certain in-office ancillary services and includes three requirements that apply to the performance, location and billing of such services.[248] Regarding the performance component, certain in-office ancillary services may be performed by an individual who is directly supervised by the referring physician or another physician in the same group practice as the referring physician.[249] The regulations define "direct supervision" as supervision by a

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241. 60 Fed. Reg. 41,937 (1995).
242. *See* 42 U.S.C. § 1395nn(e)(6) (1994).
243. 60 Fed. Reg. 41,981 (1995).
244. 60 Fed. Reg. 41,980 (1995).
245. *Id.*
246. *Id.*
247. 60 Fed. Reg. 41,979 (1995).
248. 42 U.S.C. § 1395nn(b)(2) (1994).
249. *Id.*

physician who is present in the office suite and immediately available to provide assistance and direction throughout the time services are being performed.[250]

Because Stark applies to indirect financial relationships, HCFA advises that joint ventures with physicians and hospitals should be structured in such a way that remuneration does not pass from the hospital to the physicians unless a specific Stark exception applies to the arrangement. Otherwise such remuneration may result in prohibited referrals by the physicians to the hospital.[251]

Finally, the regulations require all entities furnishing items or services for which payment may be made under Medicare to submit information to HCFA concerning their financial relationships as defined under Stark. This information must be submitted on a HCFA-prescribed form within the time period specified by the servicing carrier or intermediary. Thereafter, an entity must provide updated information within sixty days from the date of any change in the submitted documentation.[252] Consequently, hospitals and other health care organizations will have to implement processes to track such financial relationships in order to meet this ongoing reporting requirement. The sanctions for failure to meet this reporting requirement include civil money penalties of up to $10,000.00 for each day a report is not properly made after the provider's applicable deadline.[253]

2. *Hanlester Network v. Shalala.*—In April 1995, the Ninth Circuit Court of Appeals issued a potentially landmark decision in *Hanlester Network v. Shalala.*[254] In *Hanlester* the court reversed in part and affirmed in part the lower court's grant of summary judgment in favor of the government. Most importantly, the court made a number of significant holdings concerning the Medicare/Medicaid Anti-Kickback statute.[255]

First, the court held that the mere encouragement of referrals would not violate the statute. Instead, the court held an "inducement" is necessary. The court noted that the term "induce" is broader than terms like influence or encourage. The term "induce" has been defined as to bring on or about, to affect, cause to influence an act or course of conduct, lead by persuasion or reasoning, incite by motives, or to prevail on.[256] "To induce," according to the court, connotes an intent to exercise influence over the reason or judgment of another in an effort to cause the referral

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250. 60 Fed. Reg. 41,978 (1995).

251. 60 Fed. Reg. 41,956 (1995).

252. 60 Fed. Reg. 41,982 (1995).

253. *Id.*

254. 51 F.3d 1390 (9th Cir. 1995).

255. 42 U.S.C. § 1320a-7b(b) (1994). The Anti-Kickback statute provides in general that whoever knowingly and willfully offers, pays, solicits or receives any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind, in return for or to induce the referral of patients or business for which payment may be made in whole or in part by Medicare, Medicaid or certain other state health programs is guilty of a felony. Violation of the statute can result in a fine of up to $25,000 or imprisonment for up to five years, or both.

256. *Hanlester*, 51 F.3d at 1398 (citing BLACK'S LAW DICTIONARY 697 (6th ed. 1990)).

of program-related business.[257]

In addition, the court reaffirmed prior holdings that the Anti-Kickback statute is not unconstitutionally vague, citing the statute's "knowing and willful" language.[258] Further, the "in return for" language in the law does not necessitate proof of an agreement to refer Medicare related business.[259]

Finally and most importantly, the court held that a specific intent to disobey the law must be shown in order to prove a violation. The court construed the language "knowingly and willfully" in the Anti-Kickback statute as requiring the defendants to (1) know that the law prohibits offering or paying the remuneration to induce referrals, and (2) engage in prohibited conduct with the specific intent to disobey the law.[260] The court advised in a footnote that the legislative history behind the statute demonstrated that the phrase "knowingly and willfully" was intended to shield from prosecution only those whose conduct "while improper, was inadvertent."[261]

This case is significant from the perspective that should *Hanlester* become the standard for prosecution under the Anti-Kickback statute, it may be difficult for the government to prove a person acted with the requisite intent to disobey the statute. Accordingly, efforts to make anti-kickback prosecution easier may rest with Congress.

CONCLUSION

As the demand for accessible, affordable and high quality health care continues to be a focal point of public discourse and debate, legal issues attendant to implementing this important objective will abound. Current national legislative initiatives suggest a forthcoming limitation on the amount of future resources available to meet public expectation in providing health care to all citizens. Many practitioners will undoubtedly have a role in seeking a resolution of the various legal issues to come, including ethical allocations of services, collaboration or competition in providing services, and maintenance of ongoing quality of care. It is in these areas that health law developments will be most prevalent in the next years.

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257. *Id.*

258. *Id.*

259. *Id.* at 1397.

260. *Id.* at 1400.

261. *Id.* at 1399. Of significance is that the Third Circuit Court of Appeals held in United States v. Greber, 760 F.2d 68 (3rd Cir. 1985), that if one purpose of the remuneration was to induce referrals, the statute was violated. This broad interpretation has long been cited as the standard with respect to violating the Anti-Kickback statute, and it will be interesting to review future decisions regarding this law in light of the *Hanlester* decision.

1995 Developments in Indiana Appellate Procedure: Significant Rule Amendments and Important Procedural Conventions

William O. Harrington*

Introduction

Indiana appellate procedure continued to evolve in 1995. A flurry of amendments, including the addition of a completely new rule, changed the landscape of the Indiana Rules of Appellate Procedure.[1] Additionally, the Indiana appellate courts generated a body of important decisions that offers steady guidance to those who venture into appellate practice.[2]

Part I of this Article analyzes the numerous amendments to the Indiana Rules of Appellate Procedure. Part II reviews the decisions of Indiana's appellate courts in 1995 which will help the appellate practitioner understand the dynamics of various procedural conventions that pervade appellate practice. Finally, this Article discusses the value of requesting oral arguments and what may be expected in 1996.

I. Amendments to the Indiana Rules of Appellate Procedure

The Indiana Supreme Court substantially amended the Indiana Rules of Appellate Procedure in 1995. Some of the amendments were only technical in nature. Several, however, will have a lasting effect upon the landscape of appellate practice in Indiana. For ease of reference, each affected rule will be discussed separately and in numerical order.

A. Rule 2.1

Nineteen ninety-five could aptly be declared the "Year of the Appearance Form." First, plaintiff's counsel are now obligated to file an appearance at the trial level, and all trial counsel are obligated to enter their appearances on a prescribed form. Additionally, 1995 saw the birth of a new rule requiring the filing of appearances by both appellant's and appellee's counsel, as well as the form of that appearance.[3]

The content requirements of new Rule 2.1 are relatively straightforward. An appellant's appearance[4] must contain more information than an appellee's

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1. This Article addresses amendments to the Indiana Rules of Appellate Procedure that either became effective or were adopted by the Supreme Court of Indiana during 1995.

2. This Article addresses appellate decisions from November 1, 1994 through December 31, 1995.

3. Ind. App. R. 2.1 (effective February 1, 1995).

4. As to the content of appellant's appearance, Indiana Appellate Rule 2.1(A) provides:

appearance.[5]

Rule 2.1 also addresses the timing for filing an appearance. Appellants must file their appearance contemporaneously with the first document filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court.[6] Appellees must file their appearance within thirty (30) days after the appellant files an appearance, or contemporaneously with the first document filed by the appellee, whichever comes first.[7]

Do not forget to appear.

B. Rule 4

Rule 4 is one of two rules[8] that the Indiana Supreme Court amended in apparent response to a debate among three districts of the Indiana Court of Appeals during 1994. This debate centered on the extent of the appellate courts' discretion to entertain appeals from administrative agency decisions when the appellant fails to include an assignment of errors in the record of proceedings.[9]

The appearance form shall set forth the following information, as applicable:

(1) Name, address, and telephone number of the parties initiating the appeal or review;

(2) Name, address, attorney number, telephone number, FAX number, and computer address of the attorneys representing the parties initiating the appeal or review, if any;

(3) The name of the lower tribunal from which appeal or review is sought, the case number, and the name of the presiding judge or agency;

(4) In criminal cases, the sentences imposed on each count of the judgment, including a separate designation of any habitual offender enhancement and the count to which the enhancement was applied;

(5) The date of filing of the praecipe;

(6) The name of the appellate or reviewing court with jurisdiction over the case;

(7) The name, address and telephone number of the court reporter responsible for preparation of the record; and

(8) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

5. As to the content of appellee's appearance, Appellate Rule 2.1(B) provides:

The appearance form shall set forth the following information:

(1) Name, address, and telephone number of the parties;

(2) Name, address, attorney number, telephone number, FAX number, and computer address of the attorneys representing the parties; and

(3) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

6. IND. APP. R. 2.1(A).

7. IND. APP. R. 2.1(B).

8. IND. APP. R. 7.2(A)(1) was also amended.

9. *See* William O. Harrington, *1994 Developments in Indiana Appellate Procedure: Old Lessons Revisited and the Scope of the Court of Appeals' Discretion*, 28 IND. L. REV. 985, 993-96

Rule 4(C) now includes the following provisions:

> It shall be unnecessary to file a separate assignment of errors in the Court of Appeals to assert that the decision of any board, agency, or other administrative body is contrary to law. All issues and grounds for appeal appropriately preserved before the board, agency or other administrative body may be initially addressed in the appellate brief.[10]

By virtue of this amendment, Rule 4(C) now contradicts the requirements set forth in Indiana Code section 22-4-17-12(f).[11] From the point of view of good appellate practice, it is probably safe to overlook this contradiction and simply comply with the requirements of amended Rule 4(C). The appellate courts will certainly defer to the proscriptions of the Appellate Rules as promulgated by the Indiana Supreme Court.

C. Rule 7.2

The amendments to Rule 7.2 relate to the content of the record of the proceedings, the form of the transcript of the evidence and the proceedings at trial.[12] Historically, Rule 7.2(A)(1) required that the record of the proceedings include not only a copy of the praecipe but also a copy, when appropriate, of a motion to correct error or an assignment of errors for review from administrative decisions pursuant to Appellate Rule 4(C).[13] Under amended Rule 7.2(A)(1), a copy of the assignment of errors need not be included in the record of the proceedings.[14] This amendment goes hand-in-hand with amended Rule 4(C).

The old Rule 7.2(A)(3)(a) required that the transcript of the evidence and proceedings at trial be in a particular form, including certain marginal notations, type-face sizes, and margin widths.[15] The amendments to Rule 7.2(A)(3)(a) have modified these requirements. Marginal notations in the transcript of the evidence need *only* indicate the name of each witness, and whether the examination was direct, cross, or redirect.[16] It is no longer necessary to include marginal notations regarding motions and rulings on motions, exhibits, instructions given and refused, and rulings by the court.[17] However, the textual printing on each page must be no more than one and one-half inches from the left edge of the page, one inch on the right and bottom margins, and one inch from the edge of the top binding.[18] The

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(1995).

10. IND. APP. R. 4(C).
11. Harrington, *supra* note 9, at 993.
12. IND. APP. R. 7.2(A) (effective February 1, 1996).
13. Ind. App. R. 7.2(A)(1) (1995).
14. IND. APP. R. 7.2(A)(1) (effective February 1, 1996).
15. Ind. App. R. 7.2(A)(3)(a) (effective January 1, 1989).
16. IND. APP. R. 7.2(A)(3)(a) (effective February 1, 1996).
17. *Id.*
18. *Id.*

type-face must be no more than 12-point type.[19]

D. Rule 8.2

The *Bluebook*[20] reigns. After many aggravating years of practitioners trying to remember which hat to wear when citing cases, Indiana practitioners can now rely entirely on the *Bluebook*. Rule 8.2(B)(1) now dictates that case citations shall be in *Bluebook* format.[21] The following case citation format has been *rejected: Warren v. Indiana Tel. Co.* (1940), 217 Ind. 93, 26 N.E.2d 399; or *Condon v. Patel* (1984), Ind. App., 459 N.E.2d 1205. The *Bluebook* format has been *adopted: Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (Ind. 1940); or *Condon v. Patel*, 459 N.E.2d 1205 (Ind. Ct. App. 1984).[22]

Pursuant to Rule 8.2, it is also no longer necessary to use a special citation form for multiple citations.[23] Further, when briefs are copied, they cannot be reproduced by carbon paper and they must not contain more than eleven characters per inch.[24]

E. Rule 8.3

Rule 8.3(A) has been amended to clarify the requirement regarding the content of the statement of the case section in appellant's brief.[25] Prior to the amendment, the statement of the case needed to include the "disposition in the court below."[26] Rule 8.3(A)(4) is now more specific, requiring that the statement of the case include "the disposition of the case and issues in the court below."[27] Further, a copy of the sentencing order must be included in an appendix to the appellant's brief when the sentence is at issue in a criminal appeal.[28]

F. Rule 9

Rule 9(A) relates to the form of motions and petitions filed on appeal. As amended, Rule 9(A) requires that all motions utilize a typeface that is not more

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19. *Id.*

20. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (15th ed. 1991).

21. IND. APP. R. 8.2(B)(1) (effective February 1, 1996).

22. Reference to the state report, i.e., Ind. or Ind. App., is still required for cases decided by the Indiana Supreme Court prior to May 5, 1981, and for cases decided by the Indiana Court of Appeals prior to November 7, 1979. *See id.*

23. IND. APP. R. 8.2(B) (effective February 1, 1995). Rule 8.2(B)(3), relating to multiple citations, formerly provided that "If more than three authorities are cited in support of a point, the three authorities first relied upon shall be cited and printed in bold-face type, or if the brief is type-written, in capital letters." Ind. App. R. 8.2(B)(3) (1994).

24. IND. APP. R. 8.2(A)(1) (effective February 1, 1996).

25. IND. APP. R. 8.3(A)(4) (effective February 1, 1996).

26. IND. APP. R. 8.3(A)(4) (effective January 1, 1989).

27. IND. APP. R. 8.3(A)(4) (effective February 1, 1996).

28. *Id.*

than eleven characters per inch.[29]

G. Rule 11

Rule 11 relates to the procedures for rehearings and transfers. This rule was the subject of significant amendments in 1995. For clarification purposes, Rule 11(A) and Rule 11(B) were amended to reiterate that Indiana Appellate Rule 12(D) does not extend the time period for filing either a petition for rehearing or a petition for transfer.[30] Rule 12(D) already expressly states that it does not apply to Rule 11.[31] Thus, this amendment is apparently designed to provide a road map for practitioners who fail to read Rule 12(D) prior to calculating the deadline for filing a petition for rehearing or a petition to transfer.

Rule 11(B) relates to petitions to transfer.[32] It has been completely rewritten. In part, the amendment is merely an exercise in word-economy. However, much of the rewrite is substantive.[33] The petition to transfer is now limited to five (5) pages in length.[34] Any brief in support of the petition to transfer is limited to fifteen (15) pages in length.[35] Briefs in support of petitions to transfer must comply with the requirements of Rule 8.2, and any petitions or briefs filed in regard to a petition to transfer need not comply with Rule 8.3.[36] There is also no longer a provision, when a petition for rehearing has previously been filed and denied, that limits the grounds for a petition to transfer to those set forth in the petition for rehearing.[37]

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29. IND. APP. R. 9(A) (effective February 1, 1996).

30. IND. APP. R. 11 (effective February 1, 1996). Indiana Appellate Rule 12(D) provides:

> In any and all cases where motions, petitions, briefs and other papers are served upon the opposing party or his or her counsel by mail or with any properly bonded carrier, the time period specified for the filing of any answers or briefs with the clerk in response thereto shall be extended automatically and without order of the court for an additional period of five days from the date of such deposit in the Untied States Mail or with any properly bonded carrier. This rule does not extend the time period for filing a petition for rehearing or a petition to transfer under Ind. Appellate Rule 11.

31. *See supra* note 30.

32. IND. APP. R. 11(B) (effective February 1, 1996).

33. In addition to express amendments contained in the rewrite of Rule 11(B), the Indiana Supreme Court has also modified its unwritten procedures with respect to its review of an ever-growing number of petitions to transfer. Historically, the Indiana Supreme Court did not issue a separate order indicating its grant of a petition to transfer. The Supreme Court now issues an order on the date that it grants or refuses to grant transfer. *See, e.g.*, Chandler v. Board of Zoning Appeals, 658 N.E.2d 80 n.1 (Ind. 1995). This change in procedure is obviously significant because an opinion of a court of appeals is vacated upon the grant of transfer. *See* IND. APP. R. 11(B)(3). The Supreme Court's vote on transfer will be published by West in the advance sheets.

34. IND. APP. R. 11(B) (effective February 1, 1996).

35. IND. APP. R. 11(B)(6) (effective February 1, 1996).

36. *Id.*

37. IND. APP. R. 11(B) (effective February 1, 1996).

H. Rule 12

Rule 12(D) is now politically correct. It formerly contained the phrase "his counsel." After a gender-neutralizing amendment, it now contains the phrase "his or her counsel."[38] This amendment does, of course, beg the question of why Rule 12(D) was not amended to read "her or his counsel."

I. Rule 18

The last of the 1995 amendments to the Indiana Rules of Appellate Procedure is an amendment to Rule 18 regarding appeals from the Indiana Tax Court. Rule 18(E) now provides that "Any brief may contain and discuss the fiscal impact of the Tax Court's decision on taxpayers or government."[39]

II. IMPORTANT PROCEDURAL CONVENTIONS: MORE LESSONS REVISITED

Every year, Indiana's appellate courts publish a body of decisions that offers guidance to practitioners regarding the trials and travails of appellate practice. Nineteen ninety-five was not unique in this regard. This Part examines a series of opinions on procedural issues that consistently, and hopefully predictably, attend practice before Indiana's appellate courts. The goal of this Part is to identify the practical import of these decisions and the lessons that they teach.

A. Motions to Correct Error

Even the most fundamental of principles justify occasional comment. Filing a motion to correct error is generally not a prerequisite to filing an appeal, except under the limited circumstances set forth in Trial Rule 59(A) when a motion to correct error is mandatory.[40] The Indiana Court of Appeals reiterated this principle in *Corkell v. Corkell*,[41] when it held that:

> T.R. 59(A) provides that a motion to correct error is a prerequisite to appeal only in certain circumstances. When, as here, the filing of a

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38. IND. APP. R. 12(D) (effective February 1, 1995).

39. IND. APP. R. 18(E)(1) (effective February 1, 1996).

40. Indiana Trial Rule 59(A) provides:

> A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address:
>
> (1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial; or
>
> (2) A claim that a jury verdict is excessive or inadequate.
>
> All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.

41. 653 N.E.2d 998 (Ind. Ct. App. 1995).

motion to correct error is not mandatory, "[a]n appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings."[42]

Even though a motion to correct error is generally not a mandatory prerequisite to an appeal, counsel should not overlook its value as a cost-effective alternative to appeal. This is especially true when counsel perceives that the trial court has made a blatant error—more in the nature of an oversight—that may prompt the court to revisit the logic of its decision. In the event that a motion to correct error is filed, do not overlook the impact of Trial Rule 53.3(A)[43] on the timing of initiating a subsequent appeal.[44]

B. A Timely Praecipe

In 1995, the Indiana Court of Appeals reheard the case of *Jennings v. Davis*.[45] With its decision on rehearing, the court of appeals emphasized the import of Appellate Rule 2(A)'s thirty day limitation for the filing of a praecipe to initiate an appeal.[46] In *Jennings*, the praecipe was filed one day late.[47] In its first opinion, the court of appeals dismissed Jennings' appeal, holding that "[t]imely filing of a praecipe is a jurisdictional prerequisite and when the praecipe has not been timely filed we *must* dismiss."[48]

On rehearing, Jennings argued that Trial Rule 6(E) extended the time for filing the praecipe by three (3) days. In the alternative, Jennings argued that no one was prejudiced by the one day delay in filing and cited prior decisions where the court of appeals asserted its inherent discretion to consider untimely appeals. The court of appeals rejected both arguments. With respect to the Trial Rule 6(E) argument, the court of appeals held that "[t]he trial court's entry of the judgment triggered the running of the thirty day rule, not service of the notice to the parties of the

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42. *Id.* at 1001 (quoting IND. APP. R. 2(A)).

43. Indiana Trial Rule 53.3(A) provides:

> In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the praecipe under Appellate Rule 2(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

44. *See, e.g.*, Trisler v. Executive Builders, Inc., 647 N.E.2d 390 (Ind. Ct. App. 1995); Moran v. Cook, 644 N.E.2d 179 (Ind. Ct. App. 1994). In both *Trisler* and *Moran*, the appeal was dismissed when the praecipe was not filed within thirty (30) days after a motion to correct error was deemed denied as a matter of law due to the failure of the trial court to rule within forty-five (45) days as required by Indiana Trial Rule 53.3.

45. 645 N.E.2d 23 (Ind. Ct. App. 1995).

46. *See* Harrington, *supra* note 9, at 988.

47. *Jennings*, 645 N.E.2d at 23.

48. Jennings v. Davis, 634 N.E.2d 810, 810 (Ind. Ct. App. 1994) (emphasis added) (citing CNA Ins. Cos. v. Vellucci, 596 N.E.2d 926, 928 (Ind. Ct. App. 1992)).

judgment. Thus, Jennings was not entitled to benefits of T.R. 6(E)."[49] With respect to Jennings' "no prejudice" argument, the court of appeals held that:

> [T]his court does have the inherent power to exercise jurisdiction of an appeal that has not been timely initiated or perfected. This inherent power is exercised in rare and exceptional cases, such as matters of great public interest or where extraordinary circumstances exist. Generic grounds such as lack of prejudice to the opposing party or lack of disadvantage to the review court are not enough. Counsel for Jennings did not mail his praecipe to the clerk by registered or certified mail. If he had done so, the praecipe would have been timely filed on September 13, 1993. We will not use our inherent power to exercise jurisdiction where an appeal has not been timely initiated due entirely to counsel's failure to properly file the praecipe by mail. In fact, we see no excuse for counsel's failure to mail the praecipe by registered or certified mail.[50]

Timing is critical when applying for the court of appeals' jurisdiction. Make sure that a praecipe is filed in person or by certified or registered mail within thirty days of the entry of final judgment.

C. Jurisdictional Considerations

In *Dailey Oil, Inc. v. Jet Star, Inc.*,[51] the Indiana Court of Appeals reiterated the fundamental principle of subject matter jurisdiction, stating that: "It is the duty of a court, including this court, to determine whether it has jurisdiction before it proceeds to determine the rights of the parties on the merits."[52] The court of appeals dismissed the appeal after a determination that it lacked jurisdiction to review final decisions of the Indiana Department of Revenue pursuant to Appellate Rule 4(C).[53]

A second jurisdictional issue that the court of appeals will examine is the question of mootness. "When the principal questions in issue have ceased to be matters of real controversy between the parties, the errors assigned become moot questions and the court will not retain jurisdiction to decide them."[54] In a pair of decisions,[55] the Indiana Supreme Court held that the filing of a voluntary bankruptcy petition in United States Bankruptcy Court while an appeal is pending before the Indiana Court of Appeals does *not* render the appeal moot.

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49. *Jennings*, 645 N.E.2d at 24.

50. *Id.* at 24-25 (citations omitted).

51. 650 N.E.2d 345 (Ind. Ct. App. 1995).

52. *Id.* at 346 (citation omitted).

53. *Id.* at 346-47.

54. Plumlee v. Monroe Guaranty Ins. Co., 655 N.E.2d 350, 358 (Ind. Ct. App. 1995) (citation omitted).

55. *See* Carpenter v. Farm Credit Serv. of Mid-America, 654 N.E.2d 1125 (Ind. 1995); Hoover v. Hearth & Home Design Center, Inc., 654 N.E.2d 744 (Ind. 1995).

In *Carpenter v. Farm Credit Services of Mid-America*,[56] the Carpenters and Carpenter Farms, Inc., executed a promissory note secured by a mortgage against certain real estate. After they defaulted on that obligation, Carpenter Farms, Inc., filed for bankruptcy under Chapter 12 of the Bankruptcy Code. Farm Credit Services of Mid-America then filed suit against the Carpenters to collect on the note plus interest and attorney fees. The trial court entered judgment against the Carpenters and they appealed. While their appeal was pending, the Carpenters filed their joint bankruptcy petition.[57]

The Indiana Court of Appeals issued an order characterizing the Carpenters' bankruptcy petition as an election of remedies and dismissed their appeal.[58] On transfer, the Indiana Supreme Court reasoned that:

> Before the Carpenters can reorganize their finances they must have a clear picture of their financial situation. Without an appeal they will simply be stuck with the resolution of issues imposed upon them by the judgment of the trial court. . . . We think it best that appellants be able to properly resolve their liability on the note, a matter of state law, in order to facilitate more accurate bankruptcy proceedings.[59]

Consequently, "the mere filing of a petition in bankruptcy does not moot a debtor's appeal from a trial court judgment on the debt."[60]

The Indiana Supreme Court applied the holding of *Carpenter* in *Hoover v. Hearth & Home Design Center, Inc.*[61]

D. The Scope of the Court of Appeals' Discretion

During 1995, the Indiana Court of Appeals continued to sculpt the parameters of its inherent authority to consider appeals over which, for one procedural reason or another, it would otherwise lack jurisdiction. In a series of reported decisions, the court of appeals asserted that it can choose to exercise jurisdiction under certain circumstances.

In *Ramirez v. American Family Mutual Insurance Co.*,[62] the Indiana Court of Appeals applied the express grant of discretion accorded to it by Appellate Rule 4(E).[63] In *Ramirez*, the plaintiffs sued their insurance carrier and insurance agent

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56. 654 N.E.2d 1125 (Ind. 1995).
57. *Id.* at 1126.
58. *Id.* at 1127.
59. *Id.* at 1128 (footnote and citations omitted).
60. *Id.*
61. 654 N.E.2d 744, 746-47 (Ind. 1995).
62. 652 N.E.2d 511 (Ind. Ct. App. 1995).
63. Indiana Appellate Rule 4(E) provides:

> No appeal will be dismissed as of right because the case was not finally disposed of in the court below as to all issues and parties, but upon suggestion or discovery of such a situation the appellate tribunal may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are

for failure to provide coverage, fraud, bad faith, and a request of punitive damages. The trial court entered summary judgment in favor of the carrier and agent on the coverage question, and the plaintiffs appealed. The court of appeals first observed that there was no final appealable order because the trial court ruled upon less than all of the issues and made no express finding pursuant to Trial Rule 54(B).[64] Despite the absence of an appealable final order, the court of appeals relied upon Appellate Rule 4(E), holding:

> Ordinarily, an appeal from an interlocutory order must be pursued in compliance with Ind. Appellate Rule 4(B)(6), which the Ramirezes did not do. Nonetheless, we have the discretion to pass upon those adjudicated issues that are severable without prejudice to the parties.[65]

The court of appeals then found that the "coverage issue here may be severed from the fraud and bad faith claims without prejudice to the parties. Hence, we exercise our discretion to consider the merits of this appeal."[66]

In *Remington Freight Lines, Inc. v. Larkey*, [67] the jury returned a verdict in favor of the plaintiff. On December 9, 1992, the defendant timely filed a motion to correct error alleging, in part, that the verdict was excessive. On January 22, 1993, prior to the expiration of the forty-five-day limit under Trial Rule 53.3(A),[68] the trial court extended, pursuant to Trial Rule 53.3(D),[69] the time period in which it could rule on the motion to correct errors.[70] On March 1, 1993, the trial court issued an order, effective February 22, 1993, for a new trial upon the damages issue.[71] The defendant then appealed.

On appeal, the validity of the March 1, 1993 order was reviewed in light of the fact that it was issued beyond the date of the trial court's thirty-day extension for

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severable without prejudice to parties who may be aggrieved by subsequent proceedings in the court below.

64. *Ramirez*, 652 N.E.2d at 513-14. Indiana Trial Rule 54(B) provides, in relevant part, that "the court may direct the entry of a final judgment as to one or more but fewer than of all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

65. *Ramirez*, 652 N.E.2d at 514 (citing IND. APP. R. 4(E); *In re* Kirkendall, 642 N.E.2d 548, 550 n.2 (Ind. Ct. App. 1994)).

66. *Id.*

67. 644 N.E.2d 931 (Ind. Ct. App. 1994).

68. *See supra* note 43.

69. Indiana Trial Rule 53.3(D) provides:

> The Judge before whom a Motion to Correct Error is pending may extend the time limitation for ruling for a period of no more than thirty (30) days by filing an entry in the cause advising all parties of the extension. Such entry must be in writing, must be filed before the expiration of the initial time period for ruling set forth under Section (A), and must be served on all parties. Additional extension of time may be granted only upon application to the Supreme Court as set forth in Trial Rule 53.1(D).

70. *Remington*, 644 N.E.2d at 935.

71. *Id.*

ruling on the motion to correct error. It was held that:

> [T]he consequences of a trial court's failure to rule upon a motion to correct error within an extension are identical to those which occur where no extension has been granted. Once outside the thirty-day extension, the trial court has no power to rule upon the motion and any ruling thereafter is a nullity. Applying this principle to the present case, we determine that the trial court's ruling upon the motion was, indeed, a nullity. . . . *Nevertheless, to merely reverse and remand because of the procedural irregularity without addressing the merits of the appeal would be counterproductive. Accordingly, we address the other issues presented.*[72]

The court of appeals in *Remington* found that such a dismissal would be "counterproductive" because the defendant/appellant's praecipe was filed within thirty days on February 22, 1993, the earliest date on which the motion to correct error may have been deemed denied pursuant to Trial Rule 53.3(A).[73]

The discretion exercised by the court of appeals in *Remington* is apparently grounded in the equitable judicial principle of "no harm, no foul." Because trial counsel had timely filed a praecipe in contemplation of the likelihood that the March 1, 1993 new trial order would be deemed a nullity, any contrary ruling by the court of appeals would have constituted a pure elevation of form over substance.

In *Haimbaugh Landscaping, Inc. v. Jegen*,[74] the Indiana Court of Appeals exercised its discretion to consider a late appellant's brief. Appellant filed its brief thirty-one (31) days after it filed the record.[75] On the same date that appellant filed its untimely brief, appellant filed a Motion for Leave to File a Belated Brief, which the court of appeals granted.[76] The court of appeals in rejecting appellee's argument that the late brief warranted dismissal, emphasized the impact of Appellate Rule 8.1(A),[77] and held that:

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72. *Id.* at 936 (emphasis added) (citations omitted).

73. *Id.* at 935 n.3 ("No issue exists as to the propriety of the praecipe, as February 22, 1993 was the earliest possible date which could be considered a 'ruling' upon the motion to correct error as per Ind. Appellate Rule 2(A).").

74. 653 N.E.2d 95 (Ind. Ct. App. 1995).

75. *Id.* at 98.

76. *Id.* The court of appeals was apparently impressed by the justifications offered by appellant's counsel:

> Haimbaugh's counsel indicated that during the week before the filing deadline, he was involved in rendering an emergency opinion letter. He also cited confusion from the consolidation order, as well as the complicated nature of this case as reasons why he failed to note that the brief was due on September 8 rather than on September 9.

Id. at 98 n.6.

77. Indiana Appellate Rule 8.1(A) provides, in relevant part:

> The appellant shall have thirty (30) days after filing the record in which to file his brief. . . . Failure to file appellant's brief within the time limited herein, or any extension of time granted therefor, shall *subject* the appeal to summary dismissal.

> Rule 8.1(A) does not mandate an automatic dismissal when an appellate has not timely filed its brief. Dismissal for the late filing of an appellant's brief is within the discretion of this court, rather than mandatory as it was under former rules. . . . We will hold issues waived, or dismiss appeals when parties commit flagrant violations of the Rules of Appellate Procedure. However, because we prefer to decide a case upon its merits, . . . we exercise our discretion to reach the merits when violations are comparatively minor. Here, Haimbaugh has not committed a flagrant violation of our appellate rules, nor has it failed to make a good faith effort to substantially comply with those rules.[78]

Out of apparent concern that its leniency might be misconstrued, the court dropped a footnote of caution to appellate practitioners generally: "This ruling does not excuse noncompliance with the appellate rules, and no one should interpret it as doing so. It remains within this court's discretion to dismiss appeals for failure to follow the rules."[79]

In *In re Train Collision at Gary*,[80] on rehearing, the Indiana Court of Appeals asserted its discretion to reinstate a previously dismissed appeal.[81] The appeal was originally dismissed for lack of subject matter jurisdiction when the appellant failed to timely file the record of proceedings.[82] The court of appeals explained its decision as follows:

> While this court has the power to revisit prior decisions of its own, it should only do so in the case of extraordinary circumstances. [The appellees] fail to set forth any reasons why we should set aside our order to reinstate this appeal. Accordingly, we decline their invitation to revisit our decision to grant appellant's petition for rehearing and reinstate this appeal, and we will address this appeal on its merits.[83]

There is no indication in *In re Train Collision at Gary* regarding what the court of appeals believed constituted "extraordinary circumstances" that would justify its reinstatement.

Given the numerous and varied opinions from the Indiana Court of Appeals in 1995, it is essential for practitioners to factor these discretionary issues into their appellate practice. In essence, there exists a body of uncodified rules regarding the

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(emphasis added).

78. *Haimbaugh*, 653 N.E.2d at 98-99 (citation omitted).

79. *Id.* at 99 n.10 (citations omitted).

80. 654 N.E.2d 1137 (Ind. Ct. App. 1995).

81. *Id.* at 1140 n.1.

82. *Id.*

83. *Id.* (citing Landowners v. City of Fort Wayne, 622 N.E.2d 548, 549 (Ind. Ct. App. 1993)). In *Landowners*, the court of appeals held that "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a result courts should be *loathe* to do so in the absence of extraordinary circumstances." *Landowners*, 622 N.E.2d at 549 (emphasis added) (citation omitted).

"if and when" of the court of appeals' exercise of jurisdiction. It is certainly important to be mindful of the potential application of these principles to any given case.

E. Waiver Issues

Appellate practice can be a minefield saturated with the risk of procedural waiver. This subpart summarizes some of the most common waiver issues addressed in 1995.

An argument cannot be raised for the first time on appeal.[84] Any such first-time argument is deemed waived on appeal. When an appellee petitions the court of appeals for an extension of time within which to file its brief, the appellee waives the right to file a motion to dismiss the appeal.[85] The court of appeals will only consider the evidence contained in the record of the proceedings.[86] If appellant's counsel fails to make a cogent argument on an issue, that issue is deemed waived.[87] The court of appeals has held that "[i]n determining whether a party has waived an issue upon appeal, we look to whether the brief is so deficient that the reviewing court is required to make a party's argument upon its behalf."[88] In addition, arguments are waived if they are not supported by citation to relevant or controlling authority.[89] "New arguments made in a reply brief are inappropriate and will not be considered on appeal."[90]

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84. City of Hobart Sewage Works v. McCullough, 656 N.E.2d 1185, 1189 (Ind. Ct. App. 1995); White v. White, 655 N.E.2d 523, 529 n.13 (Ind. Ct. App. 1995); Evans v. Tuttle by Tuttle, 645 N.E.2d 1119, 1121 (Ind. Ct. App. 1995). *But see* Transcontinental Technical Services, Inc. v. Allen, 642 N.E.2d 981, 983 n.1 (Ind. Ct. App. 1994) ("Generally, a party may not raise an issue on appeal which was not raised in the trial court. . . . However, where an opposing party has unequivocal notice of an issue, the issue may be considered on appeal." (citation omitted)).

85. General Motors Corp. v. Indianapolis Power & Light Co., 654 N.E.2d 750, 751 (Ind. Ct. App. 1995).

86. Hyundai Motor Co. v. Stamper, 651 N.E.2d 803, 807 n.3 (Ind. Ct. App. 1995) ("[O]n appeal we are confronted with the issue as of the time it was presented to the trial court. Reference to matters outside of that time period, i.e., as subsequent trial, is inappropriate.") *See also* Chesterfield Management, Inc. v. Cook, 655 N.E.2d 98, 101 (Ind. Ct. App. 1995) ("Factual material which was not part of the record in the trial court cannot be made part of a case on appeal merely by including it in an appendix to a party's brief.").

87. Budget Car Sales v. Stott, 656 N.E.2d 261, 265 (Ind. Ct. App. 1995); Huff v. Langman, 646 N.E.2d 730, 732 (Ind. Ct. App. 1995); Remington Freight Lines, Inc. v. Larkey, 644 N.E.2d 931, 935 n.4 (Ind. Ct. App. 1994).

88. Shewmaker v. Etter, 644 N.E.2d 922, 930 (Ind. Ct. App. 1994) (citation omitted).

89. Lucre Corp. v. County of Gibson, 657 N.E.2d 150, 154 (Ind. Ct. App. 1995) (citation omitted); Calumet Nat'l Bank v. American Tel. & Tel. Co., 654 N.E.2d 816, 821 (Ind. Ct. App. 1995); Hines v. Caston Sch. Corp., 651 N.E.2d 330, 332 n.1 (Ind. Ct. App. 1995).

90. Crist v. K-Mart Corp., 653 N.E.2d 140, 144 (Ind. Ct. App. 1995) (citation omitted). *See also* Mileusnich v. Novogroder Co., 643 N.E.2d 937, 940 n.3 (Ind. Ct. App. 1994).

F. Prima Facie Error Rule

The "prima facie error" rule[91] continued to develop in 1995.[92] Pursuant to the rule, "[a] less stringent standard of review applies and an appellant need only establish prima facie error to win a reversal when the appellee fails to file a brief."[93] The court of appeals has defined prima facie error as "error appearing at first sight, on first appearance, or on the face of the argument."[94] In *Medical Specialists, Inc. v. Sleweon*,[95] the Indiana Court of Appeals explained the purpose of the prima facie error rule and its discretionary character as follows:

> The prima facie error rule protects this court and relieves it from the burden of controverting arguments advanced for reversal, a duty which properly remains with counsel for the appellee. This court is not bound by this rule, however and in the exercise of our discretion we may consider the questions properly presented and decide the case on its merits.[96]

The failure of appellee to file a brief invites a cursory review of the issues by the court of appeals. It does not often make sense to leave a favorable judgment at the trial level vulnerable to superficial appellate scrutiny. Appellees who fail to file a brief do so at their peril.

G. Summary Judgment Practice

In *Stryczek v. Methodist Hospitals, Inc.*,[97] the Indiana Court of Appeals offered further guidance regarding the new designation requirement of Trial Rule 56(C):[98]

> In the present case, neither party complied with the designation requirement contemplated by T.R. 56. Parties may no longer designate entire portions of the record, such as depositions, but must instead specifically identify relevant portions of pleadings, depositions and other evidentiary material upon which the parties relies.
>
> Here, the Hospital designated entire documents including the complaint, the answer, affidavits, the opinion of the medical review panel,

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91. Harrington, *supra* note 9, at 990.

92. Trotter v. Nelson, 657 N.E.2d 426 (Ind. Ct. App. 1995); Ferrell v. State, 656 N.E.2d 839 (Ind. Ct. App. 1995); Medical Specialists, Inc. v. Sleweon, 652 N.E.2d 517 (Ind. Ct. App. 1995); Hazuga v. Hazuga, 648 N.E.2d 391 (Ind. Ct. App. 1995); Stephens v. Stephens, 646 N.E.2d 682 (Ind. Ct. App. 1995); McKay v. McKay, 644 N.E.2d 164 (Ind. Ct. App. 1994).

93. *Ferrell*, 656 N.E.2d at 840 (citations omitted).

94. *Hazuga*, 648 N.E.2d at 393 (citations omitted).

95. 652 N.E.2d 517 (Ind. Ct. App. 1995).

96. *Id.* at 522 n.4 (citations omitted).

97. 656 N.E.2d 553 (Ind. Ct. App. 1995).

98. Harrington, *supra* note 9, at 991.

> and the proposed complaint before the Commissioner of Insurance. Although some of the documents were one page, no attempt was made to specifically identify the relevant portions of the documents which would support a finding that the Hospital was entitled to summary judgment.
>
> . . . .
>
> The failure to identify specific portions of documents upon which the parties relied to support and to refute summary judgment requires reversal of the trial court's judgment. The Hospital did not carry its initial burden to adequately demonstrate that it was entitled to summary judgment. . . . The designation errors have thwarted the purpose of the rule change which mandates designation. Besides decreasing the amount of material through which a court must sift to make rulings on summary judgment, advantages such as narrowing the issues and judicial economy have been lost.[99]

The designation standard under Trial Rule 56(C) is relatively well-defined at this point. With so many summary judgments on file, and reviewed essentially de novo on appeal, counsel must protect against the denial of a motion for summary judgment based solely upon the absence of a proper designation.

H. Judicial Notice on Appeal

In *Pigman v. Ameritech Publishing, Inc.*,[100] the court of appeals took judicial notice of certain facts regarding the ubiquity of the telephone as a necessary means of communication in our society.[101] The court of appeals acknowledged that "This court should exercise extreme caution in taking judicial notice of facts subject to proof."[102] The court of appeals then justified its actions, observing:

> At the same time, not every circumstance related to the case presents a fact requiring evidentiary proof or judicial notice. Here, implicit in our holding was an awareness that in our society the telephone is ubiquitous and is the primary means of remote interactive communication. Such an awareness comes from life's experience, which forms the background and frame of reference for every judicial opinion.[103]

I. Appellate Briefs

In *Town of Merrillville v. Merrillville Conservancy District*,[104] the Indiana

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99. *Stryczek*, 656 N.E.2d at 555 (citations omitted).
100. 650 N.E.2d 67 (Ind. Ct. App. 1995).
101. *Id.* at 69.
102. *Id.* (citing Ritz v. Indiana & Ohio R.R., 632 N.E.2d 769, 775 (Ind. Ct. App. 1994)).
103. *Id.* (citations omitted).
104. 649 N.E.2d 645 (Ind. Ct. App. 1995).

Court of Appeals offered some sagacious advice to all authors of appellate briefs:

> The appellate brief should be prepared so that each judge, considering the brief alone and independent of the transcript, can intelligently consider each question presented. The brief must be prepared so that all questions can be determined by the court from an examination of the brief without having to examine the record, because there is only one transcript to be shared among all the judges.[105]

CONCLUSION

Every year, Indiana's appellate courts offer renewed insight into the procedures that practitioners must employ to perfect and prevail on an appeal. Nineteen ninety-five was a particularly fruitful year in that regard.

Some of the evolving practices of the court of appeals are not necessarily apparent from the Rule amendments or published decisions. According to the grapevine, a request for oral argument should not be overlooked by appellate counsel.[106] If requested, it will more often than not be granted.

Nineteen ninety-six will mark the retirement of Justice Roger DeBruler from the Supreme Court of Indiana, giving Governor Evan Bayh one last opportunity to leave his imprimatur upon the composition of Indiana's court of last resort. It will certainly take several years to begin to appreciate the full influence of Justice Debruler's retirement upon the practices and procedures of our appellate courts. Nineteen ninety-six will offer the earliest of insights regarding what may lie ahead.

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105. *Id.* at 648-49 (citations omitted).

106. Indiana Appellate Rule 10(A) provides that:

> A party may request oral argument by filing a petition in writing therefor at any time after the transcript is filed, but not later than seven (7) days after the filing of the final reply brief. In the event that no reply brief is filed, the petition for oral argument shall be filed not later than seven (7) days after the expiration of the time when the reply brief was required to be filed under Appellate Rule 8.1(A). However, oral argument will not be granted except at the Court's discretion. The Court will order, without application, oral argument in such cases as it deems proper. When a cause is set down for oral argument the clerk shall notify at once the representative counsel by mail, who shall acknowledge such notice by return mail.

RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCTS LIABILITY

TIMOTHY C. CARESS*

INTRODUCTION

This Article surveys the most significant developments in Indiana product liability law from November 1, 1994 through October 31, 1995. The Article has been organized into two parts: Part I reviews both Indiana decisions and federal court decisions construing Indiana law; Part II discusses the sweeping changes made to the Indiana Product Liability Act by House Enrolled Act 1741.

I. JUDICIAL ACTION

A. Incurred Risk

In *Perdue Farms Inc. v. Pryor*,[1] the Indiana Court of Appeals addressed the defense of incurred risk as it pertains to a strict product liability action.[2] "Pryor injured his lower back while attempting to repair a jammed feed auger on a turkey farm owned by Donald Zwilling."[3] At the time, "Zwilling was under contract with Perdue Farms, whereby Perdue Farms supplied Zwilling with day-old turkeys and Zwilling raised the turkeys until maturity."[4] Pursuant to the contract, Perdue Farms supplied all feed and necessary medication for the turkeys, while Zwilling provided the housing and feed equipment.

> On September 26, 1988, Zwilling's feed delivery system jammed, and Pryor was sent to the farm to do any necessary repairs. After he investigated the problem, Pryor discovered that a three inch wing bolt was jammed next to the auger and prevented it from operating. Pryor removed the bolt with a screwdriver and then attempted to restart the auger. However, turkey feed around the auger had hardened and Pryor determined that he would need to remove the auger from the feed delivery tube in order to restart the system. Pryor then physically attempted to pull the auger from the feed line with his hands. To gain leverage, he placed both feet on grain bins beneath the auger and off the ground, placed his hands on the auger, and began to pull. The auger suddenly became dislodged and Pryor fell backward, hitting his lower back on the edge of

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1. 646 N.E.2d 715 (Ind. Ct. App. 1995).

2. The court in *Perdue Farms* also addressed the doctrine of incurred risk as it pertains to a negligence action; however, that portion of the court's opinion will not be covered in this Article.

3. *Perdue Farms*, 646 N.E.2d at 715.

4. *Id.*

a concrete pad in Zwilling's barn.[5]

Pryor filed a complaint for damages alleging that Perdue Farms was liable under the Indiana Product Liability Act. The trial court entered a general judgment in favor of Pryor on the issue of liability and Perdue Farms appealed.[6]

On appeal, the court examined whether Pryor incurred the risk of his injuries as a matter of law. The court initially noted that "[a]lthough the defense of incurred risk is a doctrine of common law negligence, it is also codified by statute as it pertains to any product liability action based on strict liability in tort."[7] Further, the court recognized that "'[i]t is not enough that a plaintiff have merely a general awareness of a potential for mishap, but rather, the defense of incurred risk demands a subjective analysis focusing upon the plaintiff's actual knowledge and appreciation of the specific risk and voluntary acceptance of that risk.'"[8]

In explaining the application of the doctrine, the court provided that the defense of incurred risk is generally a question of fact and that "the party asserting the defense bears the burden of proving incurred risk by a preponderance of the evidence."[9] The court further recognized that "[i]ncurred risk may be found as a matter of law only if the evidence is without conflict and the sole inference to be drawn is that the plaintiff knew and appreciated the risk, but nevertheless accepted it voluntarily."[10]

In its consideration of the specific facts of *Perdue Farms*, the court found that Pryor was confronted with non-emergency circumstances and that he voluntarily chose to "remove both feet from the ground and place them on the grain bins beneath the auger and then use his hands to pull the auger."[11] The court noted that Pryor testified that he "did not generally like to pull an auger by hand because he did not want to 'strain' himself, and because he 'didn't want to get hurt.'"[12] Based upon that testimony, the court concluded that "Pryor had actual knowledge that he could be injured as a result of his election to pull the auger by hand."[13] The fact that Pryor was injured as a result of falling backward, rather than as a result of straining himself, was of no consequence, as the court noted that "the defense of

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5. *Id.*

6. *Id.*

7. *Id.* at 718. *See also* IND. CODE § 33-1-1.5-4(b)(1) (1993).

8. *Perdue Farms*, 646 N.E.2d at 717 (quoting Clark v. Wiegand, 617 N.E.2d 916, 918 (Ind. 1993)). Further, the court noted that "[a] specific risk involves only the ordinary and usual risks inherent in a given act." *Id.*

9. *Id.* (citations omitted).

10. *Id.* (citing Ferguson v. Modern Farm Systems, Inc., 555 N.E.2d 1379, 1381 (Ind. Ct. App. 1990), *trans. denied*). In *Ferguson*, the plaintiff "climbed a ladder, which was not equipped with a safety cage, and used only one hand as he carried pipe in his other hand. He was injured when his hand slipped off a rung and he fell to the ground." *Id.* The court held, "as a matter of law, that the plaintiff had incurred the risk of falling off the ladder." *Id.*

11. *Id.* at 718.

12. *Id.*

13. *Id.*

incurred risk does not require a showing that the plaintiff had foresight 'that the particular accident and injury which in fact occurred was going to occur.'"[14]

The court also addressed Pryor's contention that "he might have avoided injury by using a device known as a 'come-along' to free the auger, but that he was instructed by his employer to pull a jammed auger by hand in order to avoid possible damage to the auger."[15] "The court found that Pryor testified . . . that despite his employer's instructions he had used a come-along to repair a jammed auger on every previous occasion in order to avoid injury."[16] Further, the court noted that "Pryor's employer testified that, when pulling an auger by hand, 'you have to take into consideration your safety on it' and 'you have to make sure there's nothing you're going to fall on top of.'"[17] Therefore, the court concluded that "while pulling the auger by hand may have been a recognized procedure to release a jammed auger, both Pryor and his employer had actual knowledge and appreciated the danger of using that procedure."[18]

The court found that "Pryor knew and appreciated the specific risk inherent in pulling the auger by hand and . . . [t]hat he voluntarily accepted that risk as part of his job when he chose that method instead of another."[19] The court determined that when a person, such as Pryor, "has actual knowledge of the potential for injury, but makes a deliberate and intentional choice concerning the manner in which to proceed, and he is injured as a direct result of the manner chosen, that person has voluntarily accepted the risk inherent in that choice."[20] Accordingly, the court held that "Pryor incurred the risk of his injuries as a matter of law."[21]

B. "Unreasonably Dangerous" Requirement

In *Welch v. Scripto-Tokai Corp.*,[22] the Indiana Court of Appeals addressed the "unreasonably dangerous" provision of the Indiana Product Liability Act. Randy Welch, a three-year-old, "climbed up to a shelf, which neither [of his parents] could reach without a foot stool, and obtained a disposable butane cigarette lighter. After obtaining the lighter, Randy used it to ignite a flame which then caught his pajama top on fire."[23] As a result, Randy sustained serious and permanent burn injuries.

The plaintiffs brought a strict product liability and negligence suit against the

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14. *Id.* at 718-19 (quoting Forrest v. Gilley, 570 N.E.2d 934, 936 (Ind. Ct. App. 1991), *trans. denied*).
15. *Id.* at 719.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. 651 N.E.2d 810 (Ind. Ct. App. 1995).
23. *Id.* at 812.

manufacturer and seller of the disposable butane lighter.[24] "Regarding the strict liability theory, Welch alleged that the lighter was in a defective and unreasonably dangerous condition."[25] The defendants maintained that the undisputed facts demonstrated that the lighter was not in a defective and unreasonably dangerous condition. The trial court agreed and granted summary judgment in favor of the defendants.[26]

On appeal, Welch contended that there was a genuine issue of material fact concerning "whether the lighter was in a defective condition which rendered it unreasonably dangerous."[27] Specifically, Welch maintained that a genuine issue of fact existed regarding whether a cigarette lighter, which ignites with minimal pressure, is unreasonably dangerous.[28]

The court initially noted that "in a product liability action, the plaintiff must prove that the product is in a defective condition which renders it unreasonably dangerous."[29] The court explained that "[t]he requirement that the product be in a defective condition focuses on the product itself while the requirement that the product be unreasonably dangerous focuses on the reasonable expectations of the consumer."[30] Further, the court examined the Product Liability Act, which provides in relevant part:

> "Unreasonably dangerous" refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.[31]

In *Welch*, the court addressed the specific issue of "whether a genuine issue of material fact exist[ed] regarding whether the risks imposed by a lighter which was not child-resistant [were] beyond the risks contemplated by the 'ordinary consumer.'"[32] The court noted that "a product may be 'dangerous' in the colloquial sense but not 'unreasonably dangerous' for strict liability purposes under the Act."[33] Further, the court explained that while a lighter may be dangerous in the hands of a child, such danger does not necessarily render it

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24. That portion of the court's opinion dealing with Welch's negligence allegations will not be covered in this Article.

25. *Welch*, 651 N.E.2d at 812.

26. *Id.* at 813.

27. *Id.* at 813-14.

28. *Id.* at 814.

29. *Id.* (citing Hamilton v. Roger Sherman Architects, 565 N.E.2d 1136, 1137 (Ind. Ct. App. 1991)).

30. *Id.* (citing Cox v. American Aggregates Corp., 580 N.E.2d 679, 685 (Ind. Ct. App. 1991)).

31. IND. CODE § 33-1-1.5-2(7) (1993).

32. *Welch*, 651 N.E.2d at 814.

33. *Id.* (citing Smith v. AMLI Realty Co., 614 N.E.2d 618, 622 (Ind. Ct. App. 1993)).

unreasonably dangerous under the Act.[34] The court reasoned that "[t]he ordinary consumer of a lighter is an adult and the ordinary adult consumer contemplates the risks posed by a lighter, including the dangers associated with children who play with lighters."[35] The court further reasoned that "the ordinary consumer expects a lighter to ignite a flame when operated"; accordingly, the court held that the lighter was not unreasonably dangerous and that summary judgment was appropriate.[36]

Welch further contended that the trial court, in its application of the consumer expectation test, improperly applied the open and obvious danger rule.[37] Although the court of appeals recognized that the open and obvious danger rule does not apply to strict liability claims under the Act, the court reasoned that "the relative obviousness of a defect is nevertheless relevant in determining whether a product is unreasonably dangerous."[38] Therefore, the court held that "although the [open and obvious] rule itself is inapplicable, . . . the openness and obviousness of the dangers inherent in a cigarette lighter [are properly considered] as factors in determining the risks contemplated by the ordinary consumer."[39]

Unfortunately, the result reached in *Welch* is disheartening for the consumers of Indiana. In essence, consideration of the openness and obviousness of the dangers of a given product tacitly encourages manufacturers to incorporate patently dangerous features into product design and thereby obliterate product liability because the danger, however easy to remedy, will be obvious to the consumer. Specifically, the defect would be within the contemplation of the ordinary consumer; therefore, the defect would not render the product "unreasonably dangerous" and liability would be denied. In such a circumstance, the consumer expectation test is too low to be a valid gauge of the defectiveness of the product because even patent dangers do not frustrate the consumer's expectations of safety.[40] However, in light of *Welch*, it appears that the consumers of Indiana will continue to suffer grave injustices when they are injured by products containing defects which are open and obvious.

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34. *Id.*

35. *Id.*

36. *Id.* at 815.

37. *Id.* "Under the open and obvious danger rule, a manufacturer of a product is liable only for defects which are hidden and not normally observable." *Id.* (citing Koske v. Townsend Engineering Co., 551 N.E.2d 437, 442 (Ind. 1990)).

38. *Id.*

39. *Id.*

40. For a thorough discussion regarding the inadequacies of the openness and obviousness of the dangers of a product as a basis for liability, see John Vargo, *Strict Liability for Products: An Achievable Goal*, 24 IND. L. REV. 1197 (1991); Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992).

C. "User or Consumer" and "Seller" Requirements

In *Crist v. K-Mart Corp.*,[41] the Indiana Court of Appeals examined the meaning of the "user or consumer" and "seller" requirements of the Indiana Product Liability Act. The plaintiff, Crist, was a truck driver who was employed by Hi-Way Dispatch, Inc. "Hi-Way [was] an independent trucking company hired by K-Mart to transport K-Mart's merchandise from its distribution centers to its retail stores."[42] K-Mart's employees loaded Crist's trailer at the K-Mart Distribution Center and sealed it prior to transferring it to Crist for transportation to various retail stores. The "K-Mart employees would then break the seal when Crist arrived at a retail store. Once the seal was broken, Crist would unload the trailer."[43]

> Crist was injured while unloading K-Mart's merchandise at one of the retail stores. Crist was standing on a box inside the trailer, attempting to reach another box located at the top of the stack, when the box upon which Crist was standing collapsed. Crist fell to the floor of the trailer and sustained injury.[44]

Crist brought product liability and negligence claims against K-Mart.[45] The trial court granted K-Mart partial summary judgment on Crist's product liability claim, finding that Crist was not a "user or consumer" as the term is defined in the Act.[46]

On appeal, Crist contended that the trial court erred by determining that he was not a "user or consumer" of the box.[47] In addressing the application of the "user or consumer" requirement, the court of appeals examined *Thiele v. Faygo Beverage, Inc.*[48] The *Thiele* court provided that as a "'middle man' employee at the distribution level of his employer's business who handled Faygo's product as it flowed through the stream of commerce toward the retail purchaser, [the plaintiff] was not within the class of plaintiffs intended to be protected by the

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41. 653 N.E.2d 140 (Ind. Ct. App. 1995).

42. *Id.* at 140-41.

43. *Id.* at 142.

44. *Id.*

45. Only the product liability claim will be discussed in this Article because the negligence claim was rooted in premises liability law.

46. *Crist*, 653 N.E.2d at 142. The Act provides in relevant part:

> "User or consumer" means a purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

IND. CODE § 33-1-1.5-2 (Supp. 1995).

47. *Crist*, 653 N.E.2d at 142.

48. 489 N.E.2d 562 (Ind. Ct. App. 1986), *trans. denied.*

Act."[49] Rather, the *Thiele* court found that "the legislature intended 'user or consumer' to characterize those who might foreseeably be harmed by a product *at or after* the point of its retail sale or equivalent transaction with a member of the consuming public."[50] Finally, the *Thiele* court determined that the "'legislature . . . required a 'sale' to a 'first consuming entity' before the protection afforded by the Act is triggered.'"[51]

While the court in *Crist* did note that the *Thiele* decision contained logical inconsistencies relative to the "first consuming entity" doctrine,[52] the court did not resolve those inconsistencies. Instead, the court affirmed summary judgment in favor of K-Mart on an alternative basis.[53] The court of appeals determined that K-Mart was not a "seller" of the boxes.[54] "The [Product Liability] Act defines a seller as 'a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor.'"[55] In determining that K-Mart was not a seller of the boxes in question, the court relied on *Lucas v. Dorsey Corp.*, which provided that "the occasional seller who is not engaged in that activity as part of his business is not liable in products liability."[56] In *Crist*, the court relied on the affidavit of K-Mart's transportation manager, which provided that "[t]he *boxes* were not for sale, either on a wholesale or retail basis; rather, it was the products within the boxes that were to be sold."[57] Further, the court found that the affidavit indicated that "K-Mart was not in the business of selling the boxes; instead, it was in the business of selling the products contained in those boxes."[58]

Crist presented evidence that K-Mart would sell "certain products in the original box, such as a case containing several cans of motor oil."[59] Moreover, Crist demonstrated that K-Mart would also "gratuitously provide boxes upon its customers' request for their use in transporting goods they had purchased."[60] However, the court found that the types of sporadic and isolated dealings which Crist had demonstrated did not "constitute the type of regular business activity necessary to classify K-Mart as a seller of boxes."[61] Accordingly, the court held that, as a matter of law, K-Mart was not a "seller" of the boxes in question.[62]

Additionally, the court noted that even if K-Mart were considered a seller of

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49. *Crist*, 653 N.E.2d at 142 (quoting *Thiele*, 489 N.E.2d at 585, 588).
50. *Id.* (citing *Thiele,* 489 N.E.2d at 586).
51. *Id.* at 142-43 (citing *Thiele*, 489 N.E.2d at 588).
52. *Id.* at 143.
53. *Id.*
54. *Id.*
55. IND. CODE § 33-1-1.5-2 (Supp. 1995).
56. *Crist*, 653 N.E.2d at 143 (citing Lucas v. Dorsey Corp., 609 N.E.2d 1191 (Ind. Ct. App. 1993), *trans. denied*).
57. *Id.*
58. *Id.*
59. *Id.* at 144.
60. *Id.*
61. *Id.*
62. *Id.*

the boxes, it still would not be subject to liability under the Act.[63] The court explained that "the Act provides that 'if an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the Act].'"[64] The court then determined that "the purpose of the box was not to serve as Crist's ladder during unloading" and that "such use was not reasonably expectable."[65]

D. Statute of Repose

In *Bloemker v. Detroit Diesel Corp.*,[66] the Indiana Court of Appeals addressed the applicability of the statute of repose contained in the Indiana Product Liability Act.[67] The plaintiff, Bloemker:

> was an experienced journeyman pattern maker employed by Allen Pattern Works in Fort Wayne, Indiana. A pattern is a master model used to make a mold into which molten iron is poured to form a casting. On September 19, 1990, Bloemker was making two modifications to a particular pattern as directed by his employer. In order to make the modifications, Bloemker heated the pattern. During the heating process, the pattern exploded. Bloemker was injured, losing his right arm.[68]

A post-explosion inspection revealed that the pattern had a sealed cavity that contained a mixture of sand and moisture that, when heated, expanded and resulted in the explosion. Further, the pattern in question contained only one vent hole which was inadequate to remove the sand and moisture, whereas patterns with cavities of the size involved in this case normally have more than one vent hole or access point.

> Detroit Diesel owned the pattern that injured Bloemker. Prior to the incident involving Bloemker, the pattern was used to make cast iron

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63. *Id.*

64. *Id.* (quoting IND. CODE § 33-1-1.5-2.5(c) (1988)).

65. *Id.*

66. 655 N.E.2d 117 (Ind. Ct. App. 1995).

67. The statute of repose for product liability actions is set forth in Indiana Code section 33-1-1.5-5, which provides:

> (a) This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5 [legal disabilities], it applies in any product liability action in which the theory of liability is negligence or strict liability in tort.
>
> (b) Except as provided in section 5.5 of this chapter [asbestos-related injuries], a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

68. *Bloemker*, 655 N.E.2d at 118.

> thermostat housing covers for use on Detroit Diesel's Series 149 diesel engine. PTI Industries was the direct supplier of the thermostat housing covers to Detroit Diesel. When the need for the covers arose, Detroit Diesel would contact PTI Industries who would then contact North Manchester to make the covers. North Manchester would use the pattern to make the covers and then send the covers to PTI for finishing work. PTI would then deliver the completed housing covers to Detroit Diesel.[69]

Although Detroit Diesel owned the pattern, North Manchester retained it to make the thermostat housing covers when requested. The identity of the pattern's original manufacturer was unknown. The materials designated for summary judgment established that the pattern was first placed into the stream of commerce more than ten (10) years before Bloemker's incident, although the exact date was also unknown.[70]

Bloemker brought an action against Detroit Diesel and North Manchester. Both Detroit Diesel and North Manchester moved for summary judgment, claiming that the statute of repose contained in Indiana's Product Liability Act barred any claim based upon a defect in the pattern.[71] Thereafter, the trial court granted Detroit Diesel's and North Manchester's motions for summary judgment without stating the reason or reasons for granting the motion.[72]

On appeal, Bloemker contended that his claim did not fall within the Product Liability Act and, therefore, was not subject to the statute of repose.[73] In support of his contention, Bloemker cited *Stump v. Indiana Equipment Co.*[74]

> In *Stump*, the plaintiff was a grading machine operator. He was injured when the grader unexpectedly began to move while the plaintiff stood beside it. Although the grader was equipped with a neutral safety switch designed to prevent the machine from starting while in gear, it was determined that the starter system had been rewired to avoid this safety switch.[75]

Further, the *Stump* court identified two areas of inquiry for determining whether the statute of repose applies to a plaintiff's claim; specifically, 1) the plaintiff's claim must constitute a "product liability action," and 2) the defendants must be considered "sellers."[76] Finally, the *Stump* court determined that the plaintiff's claim did not constitute a product liability action because the defect occurred after the product was delivered to the initial user or consumer.[77]

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69. *Id.*
70. *Id.* at 118-19.
71. *Id.* at 119.
72. *Id.*
73. *Id.*
74. 601 N.E.2d 398 (Ind. Ct. App. 1992), *trans. denied.*
75. *Bloemker*, 655 N.E.2d at 119.
76. *Id.* (citing *Stump*, 601 N.E.2d at 401-02).
77. *Id.*

In *Bloemker*, the court initially noted that the alleged defect of lack of adequate vent holes was created at the time of manufacture.[78] Accordingly, the court determined that Bloemker's claim constituted a product liability action.[79]

In reaching its conclusion, the court rejected Bloemker's contention that his claim was not a product liability action because the pattern was not a product.[80] "Bloemker assert[ed] that the transaction was a bailment in which the defendants provided him with an item for repair, not a product."[81] However, the court of appeals noted that a product, as defined by the Product Liability Act, is "'any item or good that is personalty at the time it is conveyed by the seller to another party.'"[82] Further, the court determined that the subject of Bloemker's cause of action was and always had been an item of personalty.[83]

The court also rejected Bloemker's contention that the pattern could not be considered a product because Detroit Diesel and North Manchester were bailors, not sellers.[84] The court found that the defendants' status did not dictate whether the pattern may be classified as a product.[85] The court further reasoned that "an item is a product so long as it is personalty at the time the seller, whoever that may be, conveys it to another party, regardless of whether that other party is the plaintiff."[86]

The court next addressed the second necessary element for determining whether the statute of repose applied to the plaintiff's case; specifically, whether the defendants were "sellers" of the product. Bloemker contended that the conveyance of the pattern to his employer was nothing more than a bailment for repairs. Therefore, according to Bloemker, Detroit Diesel and North Manchester were not sellers because they were not engaged in supplying patterns as a regular part of their business.

In its consideration of this issue, the court noted that "'[t]he seller of a defective product is immune from suit after the prescribed period of time has elapsed . . . .'"[87] Further, the court determined that the definition of "seller" was "'broad enough to include within its scope any party who was an essential part of the stream of commerce which resulted in delivery to the initial user or consumer.'"[88] However, the court held that Detroit Diesel and North Manchester were not sellers because they were not engaged in supplying patterns as a regular part of their business and that the conveyance at issue was nothing more than a

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78. *Id.*
79. *Id.* at 120.
80. *Id.*
81. *Id.*
82. *Id.* (quoting IND. CODE § 33-1-1.5-2 (1988)).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* (quoting Stump v. Indiana Equipment Co., 601 N.E.2d 398, 402 (Ind. Ct. App. 1992), *trans. denied*).
88. *Id.* (quoting *Stump*, 601 N.E.2d at 402).

bailment for repairs.[89]

In explaining its decision, the court reasoned that the defendants could not take advantage of the defenses available under the Product Liability Act unless the Act was intended to extend to a bailment situation.[90] The defendants maintained that such an extension was warranted based upon language in *Stump* indicating that the definition be "broad."[91] The defendants further claimed that including bailments within the Act's scope was supported by the reasoning in *Gilbert v. Stone City Construction Co.*[92] The court in *Gilbert* provided that the test is not whether a commercial sale has taken place, but rather "whether a defendant injected a harmful defective product into the stream of commerce."[93] Therefore, the *Gilbert* court determined that liability will "attach to one who places such a product in the stream of commerce by sale, lease, bailment, or other means."[94]

The *Bloemker* court found that *Gilbert* was not controlling "because the opinion was issued prior to enactment of the Product Liability Act in 1978."[95] The court noted that the term seller was originally defined to include "'a manufacturer, a wholesaler, a retail dealer, or a distributor.'"[96] Further, the court noted that in 1983, the definition was amended so that a "seller" included "a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor."[97] Specifically, the court noted that the inclusion of the emphasized "lessor" was an addition to the new definition, whereas a "bailor" was "conspicuously absent from the new definition" and had been "excluded from the definition of seller since the Act's inception in 1978."[98] Accordingly, the court held that bailors are not sellers within the meaning of Indiana's Product Liability Act; therefore, the court held that the defendants were not entitled to summary judgment on their statute of repose defense.[99]

E. Relevance of Rider's Non-Use of Helmet

In *Dailey v. Honda Motor Co.*,[100] Chief Judge Barker addressed the relevance of a rider's non-use of a helmet to the liability issues of incurred risk, misuse, and proximate cause. In *Dailey*, the rider of an all-terrain vehicle (ATC) was injured in an accident and brought a products liability action against the manufacturer of the vehicle. At the time of the accident, the plaintiff was not wearing a helmet,

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89. *Id.*
90. *Id.*
91. *Id.* (citing *Stump*, 601 N.E.2d at 402).
92. 357 N.E.2d 738 (Ind. Ct. App. 1976).
93. *Id.* at 742.
94. *Id.*
95. *Bloemker*, 655 N.E.2d at 120.
96. *Id.* (quoting 1978 Ind. Acts 28).
97. *Id.* at 121.
98. *Id.*
99. *Id.*
100. 882 F. Supp. 826 (S.D. Ind. 1995).

and the manufacturer contended "that evidence of the plaintiff's failure to wear a helmet was relevant to the liability issues of incurred risk, misuse, and proximate cause."[101]

With regard to the issue of incurred risk, Chief Judge Barker noted that "the issue before the trier of fact [was] whether Dailey had knowledge of the defect in the product (the ATC vehicle) which caused the injury."[102] Therefore, Chief Judge Barker determined that "[w]hether Dailey knew or did not know that he could suffer head injuries if he did not wear a helmet [had] no bearing on the question of whether Dailey knew of the ATC's defect and proceeded to ride it anyway."[103] Accordingly, Chief Judge Barker held that "Dailey's non-use of his helmet [was] not relevant to the affirmative defense of incurred risk."[104]

With regard to the defense of misuse, Chief Judge Barker noted that "the key question for the trier of fact [was] whether it was foreseeable to Honda that riders of ATCs would not wear helmets."[105] Chief Judge Barker provided that "[only] if the jury finds that it was unforeseeable to Honda that riders of ATCs would not wear helmets would evidence of Dailey's non-use of his helmet be relevant to establish the affirmative defense of misuse."[106] Further, Chief Judge Barker recognized that the foreseeability of the intervening misuse is a jury question.[107] Accordingly, Chief Judge Barker held that Honda could "only introduce evidence of Dailey's non-use of his helmet to support an affirmative defense of misuse if the jury finds that such a misuse was unforeseeable."[108] Without such a jury finding, Chief Judge Barker held that the evidence of helmet non-use to establish misuse was inadmissible.[109]

With regard to the issue of causation, Honda maintained that evidence of Dailey's non-use of his helmet was relevant in establishing that "Dailey's injuries were not caused by the allegedly defective warnings and defective device, but rather by his failure to wear a helmet."[110] Although there was no authority that had directly addressed this issue, Chief Judge Barker noted that "[t]he defendant's act need not be the sole proximate cause . . . ; '[r]ather, the question is whether the wrongful act is one of the proximate causes rather than a remote cause.'"[111] Chief Judge Barker found that "even if Dailey's failure to wear his helmet [was] a

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101. *Id.* at 827.

102. *Id.* (citing Hamilton v. Roger Sherman Architects, 565 N.E.2d 1136, 1138 n.3 (Ind. Ct. App. 1991)).

103. *Id.*

104. *Id.*

105. *Id.* (citing Underly v. Advance Machine Co., 605 N.E.2d 1186, 1189 (Ind. Ct. App. 1993)).

106. *Id.*

107. *Id.* at 828 (citing Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1156 (Ind. Ct. App. 1990)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1199 (Ind. Ct. App. 1993)).

proximate cause of his head injuries, so long as Plaintiffs [could] prove that the defective product was also a proximate cause, the existence of other proximate causes [was] irrelevant, unless his failure to wear a helmet was an unforeseeable, superseding or intervening cause of his injury."[112]

As with the defense of misuse, Chief Judge Barker would allow such evidence only if the defendant established the unforeseeability of helmet non-use.[113] Chief Judge Barker reasoned that allowing such evidence "in the absence of a finding of unforeseeability would be tantamount to adopting the doctrine of 'avoidable consequences' in the products liability context," a position which has been rejected by every court that has considered it.[114] Chief Judge Barker noted, however, that the ruling applied "only to the determination of liability, not damages, because evidence of Dailey's failure to wear his helmet may be relevant in determining how much the damages stemming from Dailey's head injury should be mitigated."[115]

F. Crashworthiness Doctrine

In *Whitted v. General Motors Corp.*,[116] the United States Court of Appeals for the Seventh Circuit addressed the crashworthiness doctrine as it relates to Indiana's Product Liability Act. In January 1993, "Whitted was driving home from work with his seat belt, a single device which included both a shoulder harness and a lap belt, securely fastened."[117] As he negotiated an S-curve, Whitted realized that the wheels on a fast approaching, oncoming car were slightly in his lane. To avoid a collision, he moved his 1987 Nova closer to the shoulder on his side of the road; however, Whitted moved too far and slid off the road and hit two trees.

> The collision thrust Whitted against the steering wheel, which broke, and the windshield, which shattered. At some point during the accident, the webbing of the seat belt separated while the female clasp (latch plate) remained fastened in the buckle. Whitted sustained fractures to two bones in his lower left arm and cuts to his forehead.[118]

Whitted sued the manufacturer and the seller, contending that the seatbelt was defective in violation of Indiana's Product Liability Act. Thereafter, the

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112. *Id.*

113. *Id.*

114. *Id.* (citing Dillinger v. Caterpillar, Inc., 959 F.2d 430, 438-40 (3d Cir. 1992); Vizzini v. Ford Motor Co., 569 F.2d 754, 766 (3d Cir. 1977) (rejecting the doctrine of avoidable consequences in a safety belt case because it would be the same as allowing contributory negligence)).

115. *Id.*

116. 58 F.3d 1200 (7th Cir. 1995).

117. *Id.* at 1202.

118. *Id.*

defendants moved for summary judgment, which the district court granted.[119]

On appeal, Whitted did not argue that the separated seatbelt was in any way linked to the initial collision; rather, he contended that his resulting injuries were enhanced by a failure of the seatbelt. As such, Whitted's claim was rooted in the crashworthiness doctrine.

Initially, the Seventh Circuit noted that the "crashworthiness doctrine imposes upon the manufacturer liability for design defects which, although not causing the initial collision, compound the resulting injuries when, because of the defects, the driver or passenger strikes the car's interior or objects exterior to the car."[120] The Seventh Circuit explained that "the crashworthiness doctrine merely expands the proximate cause element of product liability to include enhanced injuries."[121] The court reasoned that if a defect is established, the crashworthiness doctrine allows the plaintiff to recover for intensified or consequential injuries.[122] Thus, the Seventh Circuit explained that "under the crashworthiness doctrine, a defect is 'not merely the conclusion that a product failed and caused injury, but that the product failed to provide the consumer with reasonable protection under the circumstances surrounding a particular accident.'"[123]

1. Design.—The Seventh Circuit noted that "manufacturers have a duty to design products that are free of flaws which cause injury in the product's use. Thus, a manufacturer will be liable for designing a product with a defective condition which is unreasonably dangerous."[124] The court provided that "Indiana's definition of 'defect' is similar to what is commonly referred to as the consumer expectation test: a product is in a defective condition if the condition is not contemplated by the reasonable consumer and the condition is unreasonably dangerous to the expected user."[125] The court explained that "'the requirement that a product be in a defective condition focuses on the product itself; whereas, the requirement that the product be unreasonably dangerous focuses on the reasonable contemplations and expectations of the consumer.'"[126]

With regard to the legal definition of defect, the Seventh Circuit provided that the "'question is not whether it is 'possible' for something untoward to occur during an accident but whether 'the design creates unreasonable danger' according to 'general negligence principles.'"[127] Further, the court noted that "'Indiana

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119. *Id.* at 1202-03.

120. *Id.* at 1205 (citing Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1154 (Ind. Ct. App. 1990)).

121. *Id.* (citing Miller v. Todd, 551 N.E.2d 1139, 1142 (Ind. 1990) (holding that the plaintiff in a crashworthiness case has the burden of proving that the manufacturer breached its duty in a manner that proximately caused the plaintiff's injuries)).

122. *Id.*

123. *Id.* at 1205-06 (quoting *Miller*, 551 N.E.2d at 1143).

124. *Id.* at 1206.

125. *Id.* (citing IND. CODE § 33-1-1.5-2.5 (1993)).

126. *Id.* (quoting Cox v. American Aggregates Corp., 580 N.E.2d 679, 685 (Ind. Ct. App. 1991)).

127. *Id.* (quoting Pries v. Honda Motor Co., 31 F.3d 543, 545 (7th Cir. 1994)).

requires the plaintiff show that another design not only could have prevented the injury but also was cost-effective under general negligence principles.'"[128] The court found that "Whitted failed to present evidence that the product was flawed in its design and [that] he failed to illustrate that a better design was cost-effective."[129] Accordingly, the court held that summary judgment was properly issued as to the claim of design defect.[130]

2. *Warnings.*—Whitted also contended that the defendants, in violation of Indiana's product liability law, failed to warn. The Seventh Circuit initially noted that for liability for failure to warn, "the product in question must be unreasonably dangerous."[131] The court further reasoned that in order to establish danger, "a plaintiff must present more evidence than that the product failed thereby causing injury."[132] The court reasoned that the fact that a product caused or "enhanced injury does not ipso facto mean that the product was unreasonably dangerous. Rather, the product may have caused injury due to misuse of the product, or a manufacturing defect, or the age of the product."[133] Given the possibilities, the court explained that "a plaintiff must present evidence, via statistics or other means, to illustrate that under normal or expected use there is a possibility that a product may cause injury."[134]

In considering the specifics of this case, the court found that "Whitted failed to support his argument with evidence—statistical, expert, or otherwise—that the product contained a danger about which the Defendants were aware, or should have been aware, and about which the Defendants should have warned."[135] "Accordingly, since Whitted failed to demonstrate that the 1987 Nova seatbelt was unreasonably dangerous," the court held that the defendants were not liable for omitting warnings.[136]

3. *Manufacturing.*—Whitted additionally contended that "the mere circumstances of the accident indicate[d] a defect existed at the time the seatbelt was manufactured."[137] Whitted contended that Indiana law permitted an application of the doctrine of res ipsa loquitur to strict liability cases. Whitted reasoned that "the circumstances surrounding the accident would lend a reasonable

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128. *Id.* (quoting *Pries*, 31 F.3d at 546).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* The court noted that

> 'unreasonably dangerous' refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.

Id. at 1206-07 (quoting IND. CODE § 33-1-1.5-2 (1993)).

133. *Id.* at 1207.

134. *Id.* (citation omitted).

135. *Id.*

136. *Id.*

137. *Id.*

jury to infer that the seat belt was defective."[138] Specifically, Whitted contended that the circumstances which would

> lead a reasonable juror to infer that a defect existed at the time the product left the respective control of each Defendant include (a) a low speed head-on collision, (b) normal use since the purchase of the Nova, (c) his own affidavit that his 1987 seatbelt was not dilapidated from use, and (d) a broken seat belt[139]

The Seventh Circuit explained that the "doctrine of res ipsa loquitur is a rule of evidence which allows an inference to be drawn from a particular set of facts."[140] The court explained that the doctrine consists of two elements: "[(1)] it recognizes that under certain rare instances, common sense alone dictates that someone was negligent; [(2)] it requires that the injuring instrumentality be in the exclusive control of the defendant at the time of injury."[141]

The court noted that of the jurisdictions which allow theories analogous to res ipsa loquitur to prove that a manufacturing defect existed, four methods of proof have evolved.[142] The court explained that:

> [A] plaintiff should employ one of the following to establish the existence of a manufacturing defect: (1) plaintiff may produce an expert to offer direct evidence of a specific manufacturing defect; (2) plaintiff may use an expert to circumstantially prove that a specific defect caused a product failure; (3) plaintiff may introduce direct evidence from an eyewitness of the malfunction, supported by expert testimony explaining the possible causes of the defective condition; and (4) plaintiff may introduce inferential evidence by negating other possible causes.[143]

In considering "whether it would be proper to apply a type of res ipsa loquitur rationale to an Indiana product liability case," the Seventh Circuit recognized that there are theoretical inconsistencies in fusing strict products liability and res ipsa loquitur.[144] "Without attempting to alloy the two concepts," the court gleaned "from the doctrine of res ipsa loquitur the principle that, in certain rare instances, circumstantial evidence may produce reasonable inferences upon which a jury may reasonably find that a defendant manufactured a product containing a defect."[145]

In examining the facts of this case, the court determined that Whitted could not avail himself of the general application of circumstantial evidence.[146] The

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 244-45 (5th ed. 1984)).

142. *Id.*

143. *Id.* (citations omitted).

144. *Id.* at 1208.

145. *Id.*

146. *Id.*

court found that the "evidence adduced on the issue of the Defendants' control was that the seat belt appeared to be in good working condition prior to the collision, that the seat belt had never demonstrated problems before, and that the seatbelt was not cut or frayed prior to the accident."[147] The court found this evidence insufficient to create a reasonable inference; further, the court determined that Whitted did not "nullify enough of the probable explanations of the seat belt break."[148]

Moreover, the court noted that Whitted did not establish a requisite element of his prima facie case: that the seatbelt proximately enhanced his injuries. Specifically, "that the force of his body against the belt might have caused more severe injuries than those he sustained had the belt not separated."[149] Although the Seventh Circuit acknowledged that under Indiana's Product Liability Act a plaintiff may use circumstantial evidence to establish a manufacturing defect, the court held that Whitted produced insufficient evidence to demonstrate that the seatbelt broke due to a defect and, accordingly, affirmed the district court's grant of summary judgment.[150]

II. Legislative Action: Changes to the Indiana Products Liability Act

Products liability was a primary target of the recent and massive tort reform effort in Indiana. The most sweeping liability reform bill in Indiana's history, and one of the most comprehensive in the nation, became law in Indiana on July 1, 1995. House Bill 1741, "The Personal Responsibility Act of 1995," was vetoed by Governor Bayh on April 21, 1995. However, during the final week of the 1995 session, the Governor's veto was narrowly overridden in both the House and the Senate. As a result, Indiana's Product Liability Act was drastically altered and, as this discussion will point out, many of the changes fail to interface with traditional principles of products liability law.

A. Ind. Code § 33-1-1.5-1[151]

As a result of the changes to section 33-1-1.5-1, the distinction between strict liability, negligence, and breach of implied warranty has been almost completely abolished. Thus, all of the provisions of the Act, including the applicable defenses, the statute of limitations, and the provisions addressing joint and several liability and comparative fault, apply regardless of whether the action is strict liability in tort, negligence, or breach of warranty. All actions based on product defectiveness now require the plaintiff to prove that the manufacturer failed to

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147. *Id.*

148. *Id.*

149. *Id.* at 1209.

150. *Id.*

151. Ind. Code § 33-1-1.5-1 (Supp. 1995) now provides that the products liability chapter is applicable to "all actions brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought."

exercise reasonable care; specifically, strict liability has been abolished even for "unreasonably dangerous products." This is a significant change in the law of products liability, as the Act previously applied only to actions in which the theory of liability was strict liability in tort.

B. Ind. Code § 33-1-1.5-2

Under traditional product liability actions, any entity involved in the stream of commerce of a defective product could normally be held liable. However, the amended Act limits the liability of entities which deliver products into the stream of commerce. Indiana Code section 33-1-1.5-2 defines the term "manufacturer" and integrates the definition of "seller" into "manufacturer."[152] A seller may be considered a "manufacturer" under the Act in only limited circumstances; thus, a seller is not necessarily liable in a products liability action for merely being a conduit of the product in the stream of commerce. In fact, this section specifically indicates that a seller is not considered a manufacturer merely because the seller places or has placed a private label on a product.[153] Furthermore, the definition of "seller" has been limited to "a person engaged in the business as selling or leasing a product for resale, use or consumption."[154] This definition of seller eliminates a specific reference to a wholesaler, a retail dealer, lessor, or a distributor. However, if a plaintiff encounters problems obtaining jurisdiction over the actual manufacturer of a product under this section, a seller or distributor may still be liable if that would result in the court obtaining jurisdiction.[155]

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152. IND. CODE § 33-1-1.5-2(3) (Supp. 1995) provides in relevant part:

> As used in this chapter . . . "manufacturer" includes a seller who:
>
> (A) has actual knowledge of a defect in a product;
>
> (B) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
>
> (C) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer;
>
> (D) is owned in whole or significant part by the manufacturer; or
>
> (E) owns in whole or significant part the manufacturer.

153. IND. CODE § 33-1-1.5-2(3) (Supp. 1995) provides in relevant part: "A seller who discloses the name of the actual manufacturer of a product is not a manufacturer under this section merely because the seller places or has placed a private label on a product."

154. IND. CODE § 33-1-1.5-2(5) (Supp. 1995).

155. IND. CODE § 33-1-1.5-3(d) (Supp. 1995) provides, in relevant part, that:

> [I]f a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principle distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this section, the manufacturer of the product.

C. Ind. Code § 33-1-1.5-3

Major substantive changes in Indiana's product liability law were made by the modifications to Indiana Code section 33-1-1.5-3. Specifically, subsection (b)(1) contains a significant change in the law. This part of the statute makes it clear that negligence is not the basis of liability imposed on product suppliers for injury caused by defective products. The addition of the word "manufacture" and the deletion of the words "packaging, labeling, instructing for use, and sale" indicate that strict liability applies to manufacturing defects but not to other kinds of defects. In fact, the legislature added a sentence at the end of subsection 3(b) making it absolutely clear that in actions based on design or informational defects, the plaintiff must establish that "the manufacturer or seller failed to exercise reasonable care under the circumstances . . . ."[156] In other words, in order to prevail in design or informational defect cases, the plaintiff must establish that the defendant was negligent. Thus, strict liability, as first articulated by the *Restatement (Second) of Torts* section 402A, and later adopted by the Indiana legislature, now applies only to manufacturing defects in Indiana.

Obviously, this change has been viewed as a significant blow to consumer interests. It will have a significant impact on the plaintiff's choice of defendants, as local product sellers will ordinarily not be viable defendants because they are only rarely negligent with respect to design or informational aspects of the product.

Because the focus in design and warning cases will now be on whether the manufacturer exercised reasonable care, the plaintiff will have to prove negligence in design or failure to provide adequate information. To establish that the defendant manufacturer was negligent in the design of the product, the plaintiff must prove that the defendant knew or should have known that the product as designed posed a risk of harm to the user or consumer and that the risk posed was unreasonable. It is important to note that manufacturers are held to the standard of experts in the field and will be required to keep abreast of developing knowledge and techniques in the field, and to test prototypes of products for dangers in design. Thus, in most cases, manufacturers will be hard pressed to assert that they could not have foreseen dangers posed by the design.

As to the determination of reasonableness of the risk of the design, the risk-benefit approach has long been used in the majority of jurisdictions, as opposed to the consumer expectation approach, as the test for product defect and unreasonable danger in design cases. Although there is some disagreement, the risk-benefit approach to design defect is generally thought to be more favorable for plaintiffs than the consumer expectation approach, particularly where the danger posed by the product is obvious. However, the risk-benefit approach generally requires the plaintiff to present evidence that a feasible design alternative that would have eliminated or reduced the risk was available at the time the product was manufactured.

It is unlikely that the change in Indiana Code section 33-1-1.5-3(b) will have

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156. IND. CODE § 33-1-1.5-3(b) (Supp. 1995).

much impact on warning cases. Courts have consistently held that manufacturers have no duty to warn of unknowable dangers. For a manufacturer to be held liable for failure to warn, the product without an adequate warning must also pose an unreasonable risk of harm. This determination involves weighing the cost or burden of warning of the dangers against the likelihood and the extent of harm possible if a warning is not given. Generally, the cost or burden of providing a warning is relatively modest—either providing a warning or making the existing warning more complete or more conspicuous. If the probable harm is serious, the result should be a determination that the balancing of the burden of prevention (providing a better warning) against the extent and likelihood of harm will tip in favor of the victim, permitting the trier of fact to conclude that the risk posed by the product without an adequate warning is an unreasonable one.

Given that design and warning cases will now be resolved using negligence principles, it is unclear how the consumer expectation approach to "unreasonably dangerous" and "defective condition" meshes with the change. Indiana Code section 33-1-1.5-2(7) defines "unreasonably dangerous" as "any situation which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers." Further, Indiana Code section 33-1-1.5-2.5(a)(1) provides that a product is in a "defective condition" if it is in a condition "not contemplated by reasonable persons among those considered expected users or consumers of the product." These provisions were not changed in the recent revision of the product liability law.

The source of the consumer expectation test for an "unreasonably dangerous" and "defective condition" is the commentary to *Restatement (Second) of Torts* section 402A, which provides for strict liability against sellers of products that are in "a defective condition unreasonably dangerous."[157] The drafters of section 402A adopted consumer expectation as a test for defectiveness and unreasonable danger, which was to be used with the theory of strict liability in tort. While the *Restatement* consumer expectation approach was initially adopted by a majority of courts and legislatures, many courts have since concluded that consumer expectation as a test for defectiveness and unreasonable danger is unworkable. Therefore, many jurisdictions have switched to a balancing approach similar to the traditional test for negligence, at least in design and warning cases. Nevertheless, consumer expectation has remained a part of the Indiana statute from its inception.

As strict liability has been limited to manufacturing defects, the future applicability of "consumer expectation" is uncertain. It may continue to have value as a test for defectiveness or unreasonable danger in manufacturing defect cases. However, to establish liability in such cases, it is generally sufficient to demonstrate that the product causing injury deviated from the norm for such products. Although it may certainly be said that the ordinary consumer does not expect products to deviate from the norm in a way that makes the product dangerous to users, it is rarely necessary to prove that a product with a

157. RESTATEMENT (SECOND) OF TORTS § 402A, cmts. g & i (1965).

manufacturing defect disappointed consumer expectation.

However, consumer expectation may no longer apply to other product liability theories, because those cases will be tried on negligence principles. If "consumer expectation" is combined with traditional negligence principles, it will impose severe and unjust burdens on the plaintiff. Therefore, it is critical that it is recognized that the "consumer expectation" approach is now only relevant to manufacturing defect cases.

Indiana Code sections 33-1-1.5-3(c) & (d) are new subsections providing that manufacturing defect cases based on strict liability may only be brought against the manufacturers of the injury causing product, unless the court cannot obtain jurisdiction over the manufacturer.[158] In such a case, the plaintiff may sue the manufacturer's principal distributor or seller over whom the court may hold jurisdiction.[159] The effect of these provisions is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer. However, there is no exception to allow suit against a local non-manufacturing seller if the manufacturer is out of business or judgment-proof. Most jurisdictions with provisions such as this include an exception; Indiana has not. Therefore, when the manufacturer is judgment-proof, the plaintiff will remain uncompensated even if the retail seller is financially sound and would be able to satisfy a judgment. This provision can be seen as a clear example of the legislature's decision to favor the financial interests of businesses over the interests of innocent victims.

D. Ind. Code § 33-1-1.5-4

Traditionally, in a products liability action, a defendant has been limited in asserting the defense that the plaintiff misused the product. Prior to the 1995 amendments to the Act, it was a defense to a products liability action that the user knew of the defect and was aware of the danger in the product and nevertheless proceeded unreasonably to make use of the product and was injured. However, the amended Act eliminates the concept of "unreasonable" use and now simply provides that it is a defense "that the user or consumer bringing the action knew of the defect and was aware of the danger in the product and nevertheless proceeded to make use of the product and was injured."[160]

This is a significant change in the law because it obviously strengthens the defense of incurred risk in products liability actions. Reasonableness is typically

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158. *See supra* note 155. IND. CODE § 33-1-1.5-3(c) (Supp. 1995) provides:

> A product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against any seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.

159. *See supra* note 155.

160. IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1995).

a factual issue requiring resolution by the trier of fact; therefore, because it is now absent from consideration, there is the clear potential that the incurred risk defense may be routinely appropriate for summary judgment. Further, there is the distinct danger that the open and obvious danger rule may be resurrected in any situation where it can be shown that a plaintiff used a product with an obvious defect.

However, it is important to recognize that it must be shown not only that the plaintiff knew of the defect, but that the plaintiff was subjectively aware of and appreciated the danger created by the defect.[161] The issue of subjective awareness and appreciation of danger should ordinarily be left for resolution by the trier of fact. Although plaintiffs may be able to survive summary judgment, the absence of "reasonable use" consideration will nonetheless provide the deathblow for many plaintiffs who were injured by products containing patent defects.

Additionally, and perhaps more importantly, the deletion of the word "unreasonably" means that conduct described in subsection (b)(1) probably does not fall within the definition of "fault" as provided in Indiana Code section 33-1-1.5-10.[162] Thus, incurred risk will be a complete defense for the defendant, and the plaintiff will be denied any recovery. To say that this serves a grave injustice is to state, or rather understate, the obvious in the extreme. A consumer who encounters an admittedly defective product, but who *reasonably* uses it (as an ordinary person would) and is injured, cannot recover *any compensation* even though the product *was defective* and the consumer acted in a *reasonable* manner. Once again, this can be seen as a stark example of the legislature's decision to favor business interests over the interests of innocent victims.

E. Ind. Code § 33-1-1.5-4.5

The state of the art defense in strict liability[163] was changed to provide a rebuttable presumption of no negligence if the product was in conformity with the state of the art relative to the product or in compliance with applicable government codes, standards, regulations or specifications.[164] Under the previous version of the statute, conformity with state of the art was an affirmative defense; therefore, the burden was on the defendant to raise the issue and to prove by a preponderance of the evidence that the product was in conformity with the generally recognized state of the art at the time of the product's production. However, there is now a rebuttable presumption that a product that conforms with the state of the art is not defective and that its manufacturer is therefore not negligent. If the defendant introduces evidence that the product conforms with the state of the art, the presumption arises, and the plaintiff must present evidence to rebut the presumption in order to avoid summary disposition.

The second part of this section, which creates a rebuttable presumption that products in compliance with governmental regulations are not defective and the

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161. *Id.*

162. *See infra* notes 167-170 and accompanying text.

163. Formerly, IND. CODE § 33-1-1.5-4(b)(4) (1993).

164. IND. CODE § 33-1-1.5-4.5 (Supp. 1995).

manufacturers are not negligent, is completely new for Indiana.[165] The issue of what effect statutory enactments and governmental regulations should have in a products liability case arises frequently because so many dangerous products are highly regulated. In the absence of statutory provisions stating the effect of compliance or noncompliance with regulations, courts have usually applied general tort law principles and determined that failure to comply with regulations constitutes negligence per se. Conversely, the fact that a manufacturer has complied with relevant statutes or regulations generally only amounts to evidence of due care and is not dispositive.

Manufacturers of regulated products have consistently complained about the failure of courts to give sufficient weight to their compliance with government safety standards. Manufacturers maintain that regulatory bodies are in a better position than courts to do the necessary risk-benefit assessments. Instead of simply being relevant evidence of due care, proponents contend that compliance with governmental regulations should be either conclusive or at least presumptive evidence of due care. Apparently, these arguments have been heard as the Indiana legislature has concluded that compliance with governmental regulations now creates a rebuttable presumption that a product is not defective and that its manufacturer is not negligent.

Because a product with a manufacturing defect is unlikely to comply with governmental standards for such products, this provision will ordinarily apply only to design and warning cases. Thus, in a design or warning case, to overcome the presumption the plaintiff must show that the reasonably prudent manufacturer would have taken additional precautions even though its product complied with governmental regulations. However, because these cases are now governed by negligence principles, the evidence of negligence that the plaintiff must introduce in order to prevail on a negligence theory should be sufficient to demonstrate that the reasonably prudent manufacturer would have gone beyond the regulatory requirements in question.

F. Ind. Code § 33-1-1.5-9

Indiana Code section 33-1-1.5-9 is a new section of the statute which eliminates joint and several liability in product injury cases.[166] Thus, in all cases in which more than one entity has been "at fault" (as defined by Indiana Code section 33-1-1.5-10), no defendant will be liable for more than its percentage of fault. This provision obviously presents serious problems for the plaintiff and will likely produce wholly unjust results.

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165. *Id.* § 33-1-1.5-4.5(2).

166. IND. CODE § 33-1-1.5-9 (Supp. 1995) provides:

> In a product liability action where liability is assessed against more than one (1) defendant, a defendant is not liable for more than the amount of fault, as determined under section 10 of this chapter, directly attributable to that defendant. A defendant in a product liability action may not be held jointly liable for damages attributable to the fault of another defendant.

Product liability cases often involve multiple defendants and, frequently, not all of the defendants are financially responsible. Thus, if the financially responsible defendant only pays a percentage of the damages, the plaintiff will often not be fully compensated. Therefore, in passing this section, the legislature again made the determination that the innocent victim, the plaintiff, should bear the burden of the loss instead of a defendant who is not a wholly innocent party.

Under the new section, the plaintiff must go to trial prepared to prove a specific degree of fault as to each defendant. Ordinarily, it will be in the plaintiff's best interest to attempt to attribute the greatest degree of fault to the financially responsible defendant. Further, the plaintiff should also be prepared for the fact that the defendants will be pointing the finger at one another in an attempt to reduce their own percentages of fault. This may be particularly difficult for the plaintiff in cases in which the plaintiff has settled with one of the defendants, as the remaining defendants will try to place the bulk of the blame on the absent defendant, thus putting the plaintiff in the peculiar position of having to defend that party.

G. Ind. Code § 33-1-1.5-10

The products liability statute now contains its own comparative fault provision.[167] This provision establishes the apportionment principles applicable to all products liability actions. "Fault" is defined as "an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others."[168] The definition also includes any unreasonable failure to avoid an injury or to mitigate damages.[169] Additionally, this section provides that the plaintiff's fault, in whatever form it takes, will be assessed along with the fault of all other parties and nonparties alleged to have caused or contributed to the physical harm.[170] The comparative fault provision, taken in conjunction with the elimination of joint and several liability, means that product liability cases have been brought into the world of comparative fault.

This aspect of the Act represents a significant change in the law of products liability. The apportionment principles of comparative fault, which specifically did not previously apply to strict liability actions, now apply to all product liability actions regardless of the theory of action. Thus, it is now clear that the plaintiff's fault will reduce the plaintiff's recovery in all products liability actions. Further, as apportionment is to be done in accordance with the general Comparative Fault Act,[171] a determination that the plaintiff was more than fifty percent at fault will preclude the plaintiff from recovering anything.

Under comparative fault, the fault of the defendant is to be weighed against that of the plaintiff. If the plaintiff is partly at fault, but not more than fifty percent

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167. IND. CODE § 33-1-1.5-10 (Supp. 1995).
168. *Id.*
169. *Id.* § 33-1-1.5-10(a)(1).
170. *Id.* § 33-1-1.5-10(b).
171. *Id.* § 34-4-33-5.

at fault, he or she receives a discounted recovery.[172] The recovery is discounted by the percentage of the plaintiff's fault and also by the fault of any nonparties. In that tradition, this new section provides that the defendant's wrongful conduct shall be compared with that of the plaintiff. However, if there is fault of the plaintiff, and that fault falls within the easy-to-prove "incurred risk" defense,[173] then that fault is not compared with the fault of the defendant. Instead, it is a complete defense to the defendant's wrong. Such a result completely undermines the purpose and rationale of comparative fault; it certainly was never intended to give one side a complete advantage over the other.

There can be no doubt that Indiana Code sections 33-1-1.5-9 and 10 can be viewed to clearly demonstrate the legislature's extreme slant in favor of business interests. Short of resurrecting contributory negligence and making it a complete defense, it is hard to imagine how this could have been made any more favorable to a defendant. A products liability defendant will never pay more than its percentage of fault, to the detriment of a completely innocent victim; the fault of nonparties is considered in determining percentages of fault, to the detriment of the completely innocent victim; incurred risk is a complete defense and will preclude any liability on the part of the defendant, even though the defendant may have been guilty of outrageous and clearly faulty conduct. Apparently, this is the result that a majority of the legislature wanted for the injured consumers of this state.

CONCLUSION

House Enrolled Act 1741 will be subject to a considerable amount of judicial interpretation because it has conflicting provisions, is in derogation of common law, and has constitutional and procedural issues to be resolved. The Indiana legislature essentially gutted the principles of strict liability for defective products by removing the seller from the chain of liability, applying comparative fault principles, and creating complete defenses not contemplated by traditional products liability doctrine. More disturbing, however, is the fact that House Enrolled Act 1741 was poorly drafted, passed out of a committee containing no lawyers, encountered little debate, and was hastily passed by a legislature in which only fifteen members of the House and eleven members of the Senate were lawyers. The result: centuries of existing law, cultivated and developed one case at a time, was dramatically changed by the haste and apparent legal ignorance of a majority of the Indiana legislature.

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172. *Id.*

173. *Id.* § 33-1-1.5-4(b)(1).

SURVEY OF 1995 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

KEVIN P. MCGOFF*

INTRODUCTION

In 1995, the Indiana Supreme Court made substantial changes to the rules governing lawyers and the practice of law in Indiana.[1] A few of these changes impact every practicing member of the Indiana Bar because familiarity and compliance with the rules is imperative. For example, all practitioners will be affected by the requirement of mandatory continuing legal education hours on the subject of professional responsibility. The most significant change is, however, in trust account management. For the first time, Indiana lawyers will be required to comply with detailed standards for record keeping and administration of their trust accounts. The rule affecting the administration of trust accounts becomes effective January 1, 1997, allowing lawyers to become familiar with the requirements and to take appropriate measures to be in compliance by that date. The management of lawyer trust accounts will require the implementation of office procedures and the maintenance of records and, thus, a commitment by lawyers and law firms to understand the rules and assure they are in compliance.

The court also substantially changed the administration of the attorney discipline system during the past year. The modifications to Indiana Admission and Discipline Rule 23 revise the composition of the Disciplinary Commission, provide a new sanction, empower the Executive Secretary to audit lawyer trust accounts, and facilitate the discipline of Indiana attorneys who are sanctioned on a license in foreign jurisdictions.[2] This Article will provide an overview of these changes. In the past year, the supreme court also amended the Indiana Rules of Professional Conduct. The most significant modification is Rule 3.6 on trial publicity, which will be discussed herein. The court also modified Admission and Discipline Rule 2.1, regarding legal interns, and Admission and Discipline Rule 13, eliminating all of the specific law school course requirements, with the exception of legal ethics, as a prerequisite to sitting for the Indiana Bar.

In 1995, the supreme court, as in previous years, addressed in written opinions the discipline of lawyers for a variety of transgressions of the Indiana Rules of Professional Conduct. There is an unfortunate number of reported opinions and only those that may be generally helpful to the practitioner are summarized in this Article.

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1. *See, e.g.*, INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS (1987) (amended 1995) [hereinafter IND. ADMIS. AND DISC.].

2. IND. ADMIS. AND DISC. Rule 23 (1996).

I. AMENDMENTS TO INDIANA ADMISSION AND DISCIPLINE RULES

A. Lawyer Trust Accounts

The supreme court added Admission and Discipline Rule 23, section 29, entitled "Maintenance of Trust Accounts in Approved Financial Institutions; Overdraft Notification," by order dated December 21, 1995. This section is effective January 1, 1997, and it impacts all practicing lawyers. In the past, there have been no detailed standards set forth by the court for the administration of trust accounts, the keeping of trust account records, and the enforcement of the requirement that lawyers use only financial institutions that agree to comply with these rules.

All funds that a lawyer holds in trust must be placed in an account clearly identified as a "trust" or "escrow" account.[3] The depository institution shall be informed of the purpose and identity of the account and the account may be maintained only in financial institutions approved by the disciplinary commission.[4] All funds held in any fiduciary capacity in connection with the representation of a person or entity, whether as trustee, agent, guardian, executor, or otherwise must be held in a trust account.[5]

Lawyers must maintain and preserve the records of the trust account for a period of at least five years after the disposition of a matter wherein the trust account was used.[6] Attorneys are now specifically required to save for this five year period checkbooks, cancelled checks, check stubs, written withdrawal authorization, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements tendered to clients or other parties with regard to trust funds, or to maintain similar records that clearly and expressly reflect the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property held in trust.[7]

In the event of the dissolution of a partnership or professional corporation of attorneys, the attorneys must make written arrangements for the maintenance of the records required by this rule.[8] In the event of the disposition of a law practice, again, the attorney must make appropriate written arrangements for maintaining the records required by section 29.[9]

The ledger required by section 29 must include a separate record for each client, trust, or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are held, the amount of the funds, a description in the amounts of charges or withdrawals, and the names of all persons to whom funds

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3. *Id.* § 29(a)(1).
4. *Id.*
5. *Id.*
6. *Id.* § 29(a)(2).
7. *Id.*
8. *Id.* § 29(a)(8).
9. *Id.* § 29(a)(9).

were disbursed.[10] Lawyers may maintain these records by electronic, photographic, computer, or other media, provided that printed copies can be produced.[11] Lawyers are advised to seek the counsel of their accountant and attend continuing legal education programs that have been offered and, will no doubt continue to be offered in an effort to enlighten lawyers on this new rule and assist the bar in compliance.[12]

The funds maintained in a trust account shall be deposited intact and not commingled with any other funds belonging to the lawyer or law firm.[13] The records or deposits must be in sufficient detail so that each item can be identified.[14] The checkbook register alone will not be sufficient to comply with this rule, and lawyers will have to maintain more sophisticated trust account records or risk non-compliance with section 29. All withdrawals from the lawyer trust account must be based on a written withdrawal authorization that sets forth the amount of the withdrawal, as well as the purpose of the withdrawal and the payee.[15] The authorization must contain a signed approval of an attorney and shall be made only by check payable to a named payee.[16] No trust check may be made to "cash" and any wire transfers from a trust account shall be authorized by written withdrawal authorization, evidenced by a document from a financial institution that indicates the date of the transfer, the amount, and the payee.[17]

The requirement that lawyers maintain trust accounts only in financial institutions approved by the disciplinary commission is a method for monitoring the requirement that banks notify the commission of overdrafts on trust accounts. A financial institution that desires to be a depository for trust funds must file an agreement with the disciplinary commission stating that it will report to the commission whenever a withdrawal is presented against a trust or escrow account with insufficient funds.[18] This reporting requirement is mandatory, regardless of whether the instrument is honored by the bank pursuant to an overdraft agreement.[19] The commission will set forth rules governing the approval and termination of financial institutions and will annually publish a list naming these approved financial institutions.[20]

The overdraft notification agreement entered into between the commission and financial institutions must provide that in the case of a dishonored instrument, the

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10. *Id.* § 29(a)(3).
11. *Id.* § 29(a)(7).
12. *See, e.g., Nuts and Bolts of Client Trust Account Management, in* INDIANA CONTINUING LEGAL EDUCATION FORUM (February 1996); *Ethically Charging, Banking and Securing Your Fees, in* INDIANA CONTINUING LEGAL EDUCATION FORUM (April 1995).
13. IND. ADMIS. AND DISC. Rule 23, § 29(a)(4) (1996).
14. *Id.*
15. *Id.* § 29(a)(5).
16. *Id.*
17. *Id.*
18. *Id.* § 29(b).
19. *Id.*
20. *Id.*

report shall be identical to the overdraft notice typically forwarded to a depositor, including a copy of the dishonored instrument.[21] In the instance where checks are presented without sufficient funds to cover, but are honored by the institution, the notification must identify the bank, the attorney or law firm, the account number, date of presentation for payment, date paid, and the amount of the overdraft.[22] These reports by financial institutions must be made to the commission within five banking days of the date of presentment.[23]

The Executive Secretary may audit the accuracy and integrity of all trust accounts maintained by the lawyer,[24] if the Executive Secretary has probable cause to believe that a lawyer's trust account has been mishandled or not properly maintained pursuant to Admission and Discipline Rule 23, section 29 and has the approval of the Commission. This new section to Admission and Discipline Rule 23 does not authorize random audits of lawyer trust accounts. It only permits a review of a lawyer's trust account upon a determination by the Executive Secretary and the Commission that there is probable cause to believe that funds in a trust account have been improperly maintained or handled.

B. Continuing Legal Education

The second modification of the disciplinary rules that impacts the entire Indiana Bar is the modification of Admission and Discipline Rule 29, regarding mandatory continuing legal education. In the course of each three year CLE cycle, every lawyer must now complete at least three hours of approved continuing legal education in professional responsibility.[25] These three CLE hours may be integrated into a substantive program or offered as a free-standing program.[26]

C. Suspension for Child Support Delinquency

The 1995 General Assembly enacted provisions to assist in the enforcement of child support orders, whereby professional licenses, including those of lawyers, are subject to suspension upon a finding by a court having jurisdiction over child support matters that an individual has intentionally violated a child support order.[27] The Indiana Supreme Court, in referencing this newly enacted statute, modified the disciplinary rules to provide for the suspension of a lawyer who has been found to be delinquent in the payment of child support as a result of an intentional violation of an order for support. Upon the Commission's receipt of an order from

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21. *Id.* § 29(c)(1).
22. *Id.* § 29(c)(2).
23. *Id.* § 29(d).
24. *Id.* § 30.
25. IND. ADMIS. AND DISC. Rule 29, § 3(a) (1996).
26. *Id.*
27. IND. CODE § 31-1-11.5-13(k) (1993 & Supp. 1995), *amended by* Act of July 1, 1996, No. 1292, § 31, 1996 Ind. Adv. Legis. Serv. 2304, 2330-32 (Burns); IND. CODE § 31-6-6.1-16(k) (1993 & Supp. 1995), *amended* by Act of July 1, 1996, No. 1292, § 32, 1996 Ind. Adv. Legis. Serv. 2304, 2332-36 (Burns).

a trial court that a lawyer is delinquent due to an intentional violation of a support order, the Executive Secretary shall file a Notice of Intentional Violation of Support Order and Request for Suspension with the Indiana Supreme Court, notifying the attorney by certified mail.[28] The attorney will have fifteen days thereafter to file a response to this request and, thereafter, the supreme court may issue an order of suspension that will be effective until further order of the court.[29]

A lawyer suspended pursuant to section 11.1(c) may be automatically reinstated by the court upon filing a petition for reinstatement, which includes a certified copy of a court order stating that the lawyer is no longer in intentional violation of a child support order.[30] A $200.00 filing fee must accompany the petition for reinstatement.[31]

D. Modification to Procedural Rules in Attorney Discipline Cases

The Disciplinary Commission of the Supreme Court of Indiana has traditionally been a board comprised of seven members of the bench and bar. Although the rules have always allowed for two non-lawyer members, no non-lawyer has ever been appointed to the Commission. Effective February 1, 1996, the Commission has been expanded to nine members, appointed by the Indiana Supreme Court, seven of whom shall be members of the Bar and two of whom shall be lay persons.[32] The length of the terms will continue to be five years, and a reasonable effort must be made to provide a geographical representation of the state.[33] The non-lawyer members of the Commission will not be eligible for appointment as hearing officers as allowed under the rules.[34]

In the past, when a lawyer has received a grievance, there was no requirement that he or she file a response. The court amended the procedural rules and a response is now required within twenty days, or within such additional time as allowed by the Executive Secretary.[35] There were several reported cases wherein the supreme court held that a lawyer was not subject to discipline for not responding to a grievance.[36]

Indiana Rule of Professional Conduct 8.1(b) prohibits a lawyer from knowingly failing to respond to a lawful demand for information from a disciplinary authority, unless the information is otherwise protected by Rule 1.6.[37]

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28. IND. ADMIS. AND DISC. Rule 23, § 11.1(c) (1996).
29. *Id.*
30. *Id.* § 18(c).
31. *Id.*
32. *Id.* § 6(b). The two new members to the Commission shall commence their terms effective February 1, 1996, and the length of their terms shall be two and four years, respectively.
33. *Id.*
34. *Id.*
35. *Id.* § 10(a)(2).
36. *See, e.g., In re* Duffy, 482 N.E.2d 1137 (Ind. 1985); *In re* Koryl, 481 N.E.2d 393 (Ind. 1985).
37. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.1(b) (1995).

This rule is also subject to the protections of the Fifth Amendment of the United States Constitution and Article I, Section 14 of the Indiana Constitution.[38] The amendment to Rule 8.1(b) is a change in the law that opens the door to disciplining a lawyer for the knowing failure to respond to a grievance.

The supreme court may suspend an attorney from the practice of law upon the finding that the lawyer has been convicted of a crime punishable as a felony.[39] These suspensions are in effect until further order of the court or a final determination of any resulting disciplinary proceeding.[40] Judges in Indiana are obligated to transmit a certified copy of the judgment of conviction of a lawyer to the Executive Secretary within ten days after the conviction.[41] Upon receipt of information indicating that a lawyer has been convicted of a crime punishable as a felony under the laws of any state or federal jurisdiction, the Executive Secretary shall verify the information and file with the supreme court a notice of conviction and request for suspension, notifying the attorney by certified mail.[42] The lawyer shall have fifteen days thereafter to file a response and the court may then issue an order of suspension.[43]

The newly enacted rule on summary suspensions also provides a procedure for litigating suspensions pending prosecution of disciplinary complaints. If the Commission determines that there is reasonable cause to believe that the respondent is guilty of misconduct that, if proven, would warrant a suspension pending prosecution, a motion will be filed with the supreme court that will advise the hearing officer.[44] The hearing officer may, upon the Commission's motion, order the respondent to show cause why he or she should not be suspended pending final determination of the case, and a hearing will be scheduled not less than fifteen days after personal service of the notice and not less than twenty days after mailing a notice by certified or registered mail.[45]

The burden of proof will be upon the respondent, and the procedures at the summary suspension hearing will be the same as in the disciplinary proceedings.[46] If the hearing officer believes that the respondent has failed to sustain his or her burden of proof, the hearing officer will submit to the supreme court a written recommendation stating whether the respondent should be suspended pending final determination of the disciplinary case.[47] The court may forthwith enter an order of suspension, based upon the written recommendations of the hearing officer, and the respondent will have fifteen days thereafter to petition the supreme

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38. *Id.* Rule 8.1 cmt.
39. IND. ADMIS. AND DISC. Rule 23, § 11.1(a) (1996).
40. *Id.*
41. *Id.* § 11.1(a)(1).
42. *Id.* § 11.1(a)(2).
43. *Id.*
44. *Id.* § 11.1(b).
45. *Id.* § 11.1(b)(1).
46. *Id.*
47. *Id.*

court for a review of the order.[48]

The supreme court rules now provide for a sanction, known as private administrative admonition, which is less severe than a private reprimand. If the Commission determines that there is reasonable cause to believe that a respondent has committed misconduct, but the misconduct would not likely result in a sanction greater than a public reprimand if successfully prosecuted, the parties may agree to an administrative resolution of the complaint.[49] This applies only to matters determined to be "minor misconduct" and these resolutions may be reached without filing a verified complaint with the clerk of the supreme court.[50] The court rules enumerate matters that will not be considered minor and, thus, not eligible for treatment by administrative resolution. The case cannot be resolved by administrative admonition if any of the following conditions exist: misappropriation of funds or property; misconduct that is likely to result in material prejudice to a client or other person; the respondent has been publicly disciplined in the past three years; the misconduct is of the same nature as misconduct for which the respondent was either publicly or privately disciplined in the past five years; the conduct includes dishonesty, misrepresentation, deceit or fraud; or the misconduct constitutes the commission of a felony.[51]

The administrative admonition will be a letter from the Executive Secretary to the respondent that summarizes the facts and sets out the applicable violations of the Rules of Professional Conduct.[52] The admonition letter will be reviewed by each of the justices of the supreme court and will be final within thirty days thereafter, unless set aside by the court.[53] If the court does not set the admonition aside, the respondent will receive the letter, and notice of the fact that a lawyer has received a private administrative admonition will be provided to the grievant and the clerk of the supreme court.[54] The fact that a lawyer has received an admonition will be public record, but the letter of admonition is not a matter of public record.[55]

The Disciplinary Commission and the Executive Secretary have the authority to request the assistance of law enforcement agencies to assist in an investigation.[56] An addition to the rule now allows the supreme court to order a person found within Indiana to give testimony or to produce documents or other things for use in a lawyer disciplinary proceeding in another state.[57] An interested party may make application to the court and may specify the procedure for giving testimony or gathering documents that is consistent with that of a foreign jurisdiction.[58] The

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48. *Id.* § 11.1(b)(2).
49. *Id.* § 12(a).
50. *Id.*
51. *Id.* § 12(a)(1)-(6).
52. *Id.* § 12(b).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* § 19(a).
57. *Id.* § 19(b).
58. *Id.*

court may order an individual to give a statement, testify or provide documents before a person appointed by the court.[59] The individual must give testimony only in the county wherein he or she resides, is employed or transacts business in person, or at another convenient place set forth in the order.[60] The supreme court's order may be enforced in the circuit court of the county where the person who was commanded to appear is domiciled.[61]

The supreme court also modified the rule on the public disclosure of disciplinary proceedings. Previously, once a verified complaint was filed by the Commission the only information that the Commission or the clerk of court were at liberty to disclose was information unrelated to the merits of the case.[62] Once the case was resolved, the clerk was authorized to disclose "upon proper request" all matters filed in a closed cause, with the exception of the contents of a private reprimand.[63] Henceforth, all proceedings, with the exception of adjudicative deliberations, and all papers filed with the clerk shall be opened and available for public inspection.[64] Proceedings and documents that relate to matters that have not resulted in the filing of a verified complaint are not open to the public, nor may the investigative reports and other work product of the Commission be open to public inspection.[65]

Hearings shall be open to the public unless the hearing officer orders a closed hearing on motion of one of the parties or sua sponte.[66] A hearing will be ordered closed if the hearing officer believes it necessary for any of the following purposes: (1) the protection of witnesses; (2) to prevent likely disruption of the proceedings; (3) for security reasons; (4) to prevent the unauthorized disclosure of attorney-client confidences that are not at issue in the proceedings; and (5) for good cause shown, which in the judgment of the hearing officer, requires a closed hearing.[67]

A lawyer who is admitted to practice in Indiana and sanctioned in another state has the responsibility to notify the Executive Secretary.[68] The notice must be in writing and must be given within fifteen days of the issuance of a final order in another jurisdiction.[69] Thereafter, the Executive Secretary will file a notice with the supreme court, attaching a certified copy of the order of discipline and requesting an order to the Executive Secretary and the lawyer directing them to show cause, within thirty days from service of the order, why an identical

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59. *Id.*
60. *Id.*
61. *Id.*
62. Ind. Admis. and Disc. Rule 23, § 22(a) (1987) (amended 1995).
63. *Id.*
64. *Id.*
65. IND. ADMIS. AND DISC. RULE 23, § 22(a) (1996).
66. *Id.* § 22(b).
67. *Id.* § 22(b)(1)-(5).
68. *Id.* § 28(a).
69. *Id.*

discipline in Indiana would be unwarranted.[70] Upon the expiration of thirty days from service of the order, the court will impose an identical sanction unless one of the following clearly appears on the face of the record from which the discipline is predicated: (1) the procedure lacked in notice or in opportunity to be heard and constituted a deprivation of due process; (2) there was an "infirmity of proof" to establish the misconduct, giving rise to the clear conviction that the Indiana Supreme Court could not accept the conclusion on that subject as final; (3) the imposition of the same discipline by the court would be inconsistent with standards governing sanctions in the Indiana rule or would result in a grave injustice; or (4) the misconduct established warrants substantially different discipline in Indiana.[71]

E. Legal Interns and Requirements for Admission to Examination

The supreme court changed two rules that affect law students. The supreme court added a requirement that a law student serving as a legal intern must have completed or be enrolled in a course in legal ethics or professional responsibility.[72] The court also changed the requirements for admission to the Indiana Bar Examination. The former version of the rule designated courses in the law school curriculum that were to be completed as a prerequisite to taking the bar examination.[73] All of the specific class requirements have been deleted, with the exception of the requirement that one must have two cumulative semester hours of legal ethics or professional responsibility.[74]

II. MODIFICATION TO TRIAL PUBLICITY RULE

Perhaps in reaction to the media circus surrounding a recent trial in California, Rule 3.6 of the Rules of Professional Conduct, regarding trial publicity, was modified effective February 1, 1996. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be publicly disseminated if the lawyer knows or should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[75] This has been the rule for some time. However, such a statement will now be rebuttably presumed to have a substantial likelihood of materially prejudicing a judicial proceeding if the public comments are related to the very specific issues set forth in Rule 3.6(b).[76]

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70. *Id.* § 28(b).

71. *Id.* § 28(c). The reciprocal disciplinary proceedings are similar to the RULES OF DISCIPLINARY ENFORCEMENT, LOCAL RULES OF THE UNITED STATES DIST. COURT FOR THE S. DIST. OF INDIANA and the LOCAL RULES OF THE UNITED STATES DIST. COURT FOR THE N. DIST. OF INDIANA.

72. IND. ADMIS. AND DISC. Rule 2.1(a)4 (1996).

73. Ind. Admis. and Disc. Rule 13(c) (1987) (amended 1995).

74. IND. ADMIS. AND DISC. Rule 13(c) (1996).

75. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1996).

76. Rule 3.6(b) states:

A statement referred to in paragraph (a) will be rebuttably presumed to have a

A lawyer involved in the investigation or litigation of a case may state the following: a brief description of the legal claim or legal defense; information contained in the public record; that an investigation is in progress; the offense, claim or defense involved and, except when prohibited by law, the identity of the persons involved; the scheduling or result of any stage in the litigation; a request for assistance in obtaining evidence and information necessary thereto; a warning of danger concerning the behavior of a person involved when there is a reason to believe that there is a likelihood of harm to an individual or the public interest; and certain information about the accused in a criminal case.[77]

III. SYNOPSIS OF LAWYER DISCIPLINARY CASES

A. Judicial Misconduct

1. In re Goodman.—In *In re Goodman*,[78] Judge Goodman was charged with violating the 1975 Code of Judicial Conduct. He was charged with violating cannons which state that a judge should avoid the appearance of impropriety, avoid nepotism and favoritism and cannons that require the judge's staff to observe the standards of fidelity and diligence applicable to judges.

On May 17, 1994, Judge Goodman issued an anti-nepotism policy. However, before this time, and during his tenure as presiding judge of the Marion Municipal Court, from 1989 until June 1994, several employees were hired who were close

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substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1996).

77. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1996).

78. 649 N.E.2d 115 (Ind. 1995).

relatives of court employees. The Court Administrator hired his daughter, his daughter's fiancé, and the brother of his daughter's fiancé. The Court Administrator was also allowed to approve pay raises for his family members. The Assistant Court Administrator hired three family members. The daughter of the head of the Probation Department was hired, and Judge Goodman's son worked for the court during school vacations.

In June of 1992, Judge Goodman contracted with a corporation to provide certain services to the Marion Municipal Courts. The owner of the corporation was a close personal friend of the Court Administrator. The owner of the corporation hired the Court Administrator's son-in-law, who had left his employment with the Marion Municipal Court, and the son-in-law was placed in charge of the court program for the corporation. In September of 1992, Judge Goodman became engaged to marry the in-house accountant for the corporation and the owner of the corporation hosted an engagement party for the judge and his fiancé.

The Disciplinary Commission and Judge Goodman agreed that he did not profit or intend to profit by the corporation providing services to the court.[79] However, the parties also agreed that these circumstances gave rise to a perception that the court's business was based upon the exchange of favors.[80] The Indiana Supreme Court accepted the agreement that Judge Goodman had engaged in misconduct as he allowed a perception of impropriety to exist.[81] The court also accepted the agreement with the Commission that the appropriate sanction in this case was a public reprimand.[82]

2. In re Hughes.—In *In re Hughes*,[83] Robert Hughes was the elected judge of the Carmel, Indiana, City Court and he also maintained a private law practice. He was charged with submitting false reimbursement claims. Under Count I of the verified complaint, the Indiana Supreme Court found that on August 15, 1990, Judge Hughes attended a judicial conference and, although there was no tuition fee charged, Hughes requested reimbursement of $200.00 for the cost of the conference.[84] He received a check for $200.00 from the clerk-treasurer. Under Count II of the complaint the court found that Judge Hughes requested the clerk-treasurer to reimburse him the sum of $294.00 for the tuition of an ICLEF seminar that only cost $147.00 to attend.[85] In Count III the court found that Hughes received reimbursement in the amount of $810.00 for the cost of attending conferences that never occurred.[86] Under Count IV of the verified complaint, the court found that the judge had submitted a claim for $945.00 to the clerk-treasurer, purportedly for expenses incurred while attending a conference

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79. *Id.* at 116.
80. *Id.*
81. *Id.* at 116-17.
82. *Id.* at 117.
83. 640 N.E.2d 1065 (Ind. 1994).
84. *Id.* at 1066.
85. *Id.*
86. *Id.*

sponsored by the National Judicial College in Montana, but the judge never attended such a conference because it was never conducted.[87]

On March 2, 1993, Hughes was charged in Hamilton Superior Court with three counts of theft (each a Class D felony) and one count of official misconduct (a Class A misdemeanor). He gave up his position as judge, and on February 1, 1994, Hughes pled guilty to all charges.[88] He received four one year sentences in the Hamilton County Jail, each to run concurrently. The sentences were suspended and he was placed on probation for one year.[89] The Indiana Supreme Court found that Hughes had violated Rule 8.4(b) by committing criminal acts that reflected adversely upon his "honesty, integrity, trustworthiness and fitness as a lawyer."[90] Hughes had also violated Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation.[91]

In assessing an appropriate disciplinary sanction, the Indiana Supreme Court took into account several mitigating factors. Hughes had a good reputation and a record of honesty and integrity. He appeared to be remorseful for his misconduct and testified that his health had deteriorated due to the stress involved in trying to balance his judicial duties and private law practice. He was diagnosed as suffering from bipolar disorder, mixed with depression. Hughes made full restitution to Hamilton County before the criminal charges were filed. The court recognized the mitigating factors and stated that those factors could not overshadow the fact that his egregious misconduct and dishonesty had risen to levels of felonious conduct.[92] The court stated that the respondent violated the public's trust and confidence in the judiciary and that such actions were likely to injure the public's perception of the judiciary.[93] The court found that it was appropriate to impose the strongest disciplinary sanction and disbarred Robert E. Hughes from the practice of law in the State of Indiana.[94]

B. Contempt of Court

In *In re Anonymous,*[95] the attorney had been suspended for his failure to pay his attorney's registration fee and for failure to comply with the mandatory continuing legal education requirements. He was employed in a position that was not related to the practice of law. While still under suspension, the attorney wrote a letter on behalf of his employer to the Court of Common Pleas in Delaware

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87. *Id.* at 1067.

88. *Id.*

89. *Id.* Hughes was also prohibited, by court order, from holding public office of trust or profit for five years. *Id.*

90. *Id.*; *see also* INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1987).

91. *In re Hughes,* 640 N.E.2d at 1067; *see also* INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1987).

92. *In re Hughes*, 640 N.E.2d at 1067.

93. *Id.*

94. *Id.* at 1068.

95. 646 N.E.2d 666 (Ind. 1995).

County, Ohio. In this letter, the attorney requested an extension of time within which to answer a complaint that had been filed against the employer to allow the employer time to engage local counsel. The attorney signed the letter as attorney for the defendant, although he was suspended from the practice of law. Following this, the attorney met his requirements and again became a member of the Bar in good standing.

The attorney was found in contempt of the Indiana Supreme Court for failing to abide by the court's order of suspension.[96] The attorney stated that on reflection he realized the implications of signing his name as an attorney, although neither he nor his employer intended for him to represent the employer in the litigation. The attorney expressed his sincere remorse and apology. The Indiana Supreme Court stated that it was mindful that the attorney's conduct did not result in harm to the public or his client or the opposing party.[97] The attorney had been engaged in the practice of law from 1963 to 1988 without any disciplinary or contemptuous incidents. Given the attorney's overall professional and personal record, and his remorse, the court entered a finding of contempt and assessed costs against the attorney, but did not impose other penalties.[98]

C. Confidential Communications

1. In re Anonymous.—In *In re Anonymous*,[99] the attorney was charged with violation of Rules 1.6(a), 1.8(b) and 1.16(a)(1).[100] The Disciplinary Commission and the attorney submitted an agreed statement of circumstances and a conditional agreement for discipline to the supreme court for approval pursuant to Admission and Discipline Rule 23, section 11(c).[101] The agreed upon sanction was a private reprimand, which was approved by the Indiana Supreme Court.[102] The facts of the case were set forth in an anonymous opinion to educate the bar, a means which was used in several cases during this reporting period.

The attorney was contacted by a client to represent her in an action to recover unpaid child support. During a review of the various documents supplied by the client, the attorney noted that the client and the client's former husband were jointly liable for a $4,500.00 debt in favor of the local county welfare department. At the time, the attorney was under contract to represent the same local county welfare department. The attorney informed the client that the representation could not be undertaken, and with the client's permission forwarded the documents to another attorney.

Following this, the attorney received approval from the local county welfare

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96. *Id.* at 667.

97. *Id.*

98. *Id.*

99. 654 N.E.2d 1128 (Ind. 1995).

100. *See* INDIANA RULES OF PROFESSIONAL CONDUCT Rules 1.6(a), 1.8(b) & 1.16(a)(1) (1987).

101. *See* IND. ADMIS. AND DISC. Rule 23, § 11(c) (1996).

102. *In re Anonymous,* 654 N.E.2d at 1129.

department to file a collection suit against her client's former husband for the unpaid debt. Later, the former husband's counsel joined the attorney's former client as a party to the suit and the attorney did not withdraw from the case after the former client was joined as a party-defendant. The attorney ultimately obtained summary judgment against her former client and the client's ex-husband.[103]

The Indiana Supreme Court found that the attorney had revealed information related to the representation of the former client without the former client's consent and thus violated Rule 1.6(a).[104] By using this information to the disadvantage of the client, the attorney also violated Rule 1.8(b).[105] By failing to withdraw as counsel for the local welfare department during the collection suit against the former client the attorney violated Rule 1.16(a)(1).[106]

As a mitigating factor, the court recognized that all of the information gained by the attorney during the representation of the client was readily available from public sources and was not confidential in nature.[107] The attorney had declined to represent the client after she had learned of the outstanding debt owed to the county welfare department and advised her to seek other counsel.[108] She did not at any time request that the client sign an employment agreement, seek a retainer fee or otherwise charge her.[109] The court found no evidence of selfish motive on the attorney's part, and agreed that a private reprimand was a suitable disciplinary measure.[110]

2. *In re Mullins*.—In *In re Mullins*,[111] the parents of Sue Ann Lawrance petitioned the Hamilton Superior Court for authority to compel Sue Ann's health care provider to withdraw her artificially administered hydration and nutrition in March 1991. Sue Ann had been in a vegetative state due to severe brain damage since June 1987. Sue Ann's parents asserted in their petition that Sue Ann was not expected to recover and that future treatment was futile. On May 2, 1991, the court held that Sue Ann's parents had legal authority to consent to the withdrawal of her artificially delivered nutrition and hydration.[112] Sue Ann was removed from the Hamilton County Nursing Home to St. Vincent's Hospice in Marion County some time after May 2, 1991.

On or about March 26, 1991, the attorney, Patti Sue Mullins, created the Christian Fellowship For The Disabled, Inc. On May 16, 1991, Mullins filed, on behalf of the Christian Fellowship, a petition for the appointment of a guardian over an adult incompetent in the Marion Superior Court. In that petition, Mullins

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103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 1129-30.
111. 649 N.E.2d 1024 (Ind. 1995).
112. *Id.* at 1025.

sought the establishment of an emergency guardianship of Sue Ann, asserting that at the time of the petition Sue Ann was the victim of intentional, willful and purposeful neglect and/or abuse by her parents, her medical doctors and health care providers and that she was being denied essential nutrition and hydration contrary to law. The Marion Superior Court ruled that a temporary limited guardian should be appointed for Sue Ann.[113] Mullins then secured a twenty-one day stay of the Hamilton Superior Court's Order directing the withdrawal of Sue Ann's hydration and nutrition.[114] Shortly after this stay was issued, Mullins transmitted portions of Sue Ann's medical records by fax to several news media outlets throughout Marion County.[115]

Mullins was charged with three distinct violations of the Rules of Professional Conduct. First, she was charged with violating Rule 1.6; by transmitting Sue Ann's medical records to various media outlets in Marion County, Mullins intentionally revealed information relating to the representation of the client without the client's consent.[116] The Indiana Supreme Court found that Mullins had violated this rule because there was no legitimate reason for Mullins to disseminate the records of Sue Ann.[117] Not only were these records information relating to the representation of a client, but they were also classified as non-public records under Indiana Public Record Law,[118] and as confidential court records pursuant to Indiana Administrative Rule 9(k).[119] The court also found that Mullins had violated Rule 4.4 in that the act of transmitting Sue Ann's medical records had no substantial purpose other than to embarrass, delay or burden a third person during the representation of a client.[120] The third charge alleged that Mullins was in violation of Rule 3.3(d), based on Mullins' requested relief in the Marion Superior Court for an *ex parte* proceeding, without sufficiently or fully advising that court of all relevant aspects of the pending parallel proceeding in the Hamilton Superior Court. The court found that Mullins had violated Rule 3.3(d).[121]

The court imposed the sanction of a public reprimand against Patti Sue Mullins.[122] It based this reprimand upon several mitigating factors. The court noted that Mullins had no prior disciplinary record, and that she had devoted significant amounts of time and energy during her legal career to public causes.[123] Further, the court found that Mullins' actions were not because of any " sinister motive, but instead resulted from her misguided pursuit of ideological

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113. *Id.*
114. *Id.*
115. This appears to have been an attempt to justify her involvement in the litigation.
116. *In re Mullins*, 649 N.E.2d at 1025.
117. *Id.*
118. IND. CODE § 5-14-3-4(a)(8) (1993).
119. *In re Mullins*, 649 N.E.2d at 1025-26.
120. *Id.* at 1026.
121. *Id.*
122. *Id.*
123. *Id.*

objectives."[124]

3. In re Robak.—In *In re Robak*,[125] the attorney had represented a client in numerous legal matters over a number of years. On July 15, 1978, the client married, and soon thereafter the client and his new wife signed a marital property agreement. The attorney did not draft this document. The agreement provided that any will made by either party need not contain provisions in favor of the other party. At various times after the agreement was signed, the attorney drafted wills for his client and the last will that he made for his client contained no provisions for the benefit of the wife. On the same day that the client executed this will, he also executed a trust agreement that gave his wife the income from the trust corpus and the right to live in the marital home. Shortly thereafter, Robak drafted a will for his client's wife.

The client later died and the attorney was employed to represent the estate. The will that he had drafted was entered to probate and, thereafter, the wife instituted proceedings against the estate to claim her one-third Indiana statutory spouses share. The validity of the marital property agreement, which provided against the election, was disputed.

The attorney represented the estate against the claims of the wife. The court found that the wife had been a former client of the attorney, and that in opposing her, the attorney violated Rules of Professional Conduct 1.9 and 8.4(a). The attorney contended that the Commission offered no evidence that the wife's claims against the estate were substantially related to the attorney's prior representation of the wife.[126] He also claimed that the Commission failed to prove that the interests of the estate and those of the wife were materially adverse, stating that in fact his representation of the wife had nothing to do with her claim against the estate.[127]

The supreme court recognized that it had never specifically defined the meaning of "substantially related matter" within the context of Rule 1.9(a).[128] The court found that the Commission had met its burden of proof by showing that the attorney represented the wife in the preparation of her will and then represented the estate in a substantially related matter.[129] The Indiana Supreme Court examined the record and explained as follows:

> [The court is] satisfied that the preparation and execution of the wife's will in 1981, being by nature a provision for the ultimate disposition of her property in accord with the existing marital property agreement, was sufficiently interwoven with her later attempts in the estate action to challenge the validity of the marital property agreement so as to satisfy the

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124. *Id.*
125. 654 N.E.2d 731 (Ind. 1995).
126. *Id.* at 734.
127. *Id.*
128. *Id.*
129. *Id.*

"substantially related" element.[130]

The court was also satisfied that the wife's claim against the estate was materially adverse to the interests of the estate.[131] The court suggested that there were certain factors that could be examined in order to determine whether a matter was materially adverse. These factors included, the "duration and intimacy of the lawyer's relationship with the clients, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client if conflict does arise."[132]

In the underlying case, the attorney represented the co-executors of the estate. An executor is duty bound to manage and protect those assets over which he has possession for both the creditors and the distributees by employing reasonable precautions against any loss to the estate.[133] The attorney's duty to aid in the preservation of the estate's assets was materially adverse to the wife's objective of seeking more from the estate than was originally provided to her in her husband's estate plan.[134] The attorney sought to establish the validity of the marital property agreement to preserve the estate's assets while the wife sought to invalidate the same agreement. As such, the supreme court concluded that the attorney's representation of the estate was materially adverse to his former representation of the wife and, therefore, the attorney violated Rule 1.9(a).[135]

The attorney also disputed the finding that he had violated Rule 1.9(b). The attorney contended that his preparation of the wife's will had nothing to do with the wife's subsequent challenge to the client's will, arguing the information gained during the prior representation could not have been used to the wife's disadvantage. In litigating the wife's claim against the estate, the attorney deposed the wife, asking various questions concerning the meeting that they had when he drafted her will. By his questions, he attempted to elicit from the wife that she recognized the validity of the marital property agreement at the time she executed her will. The supreme court found that during the questioning, the attorney had sought to elicit from the wife testimony about events which had occurred during their meeting.[136] The attorney had specifically questioned the wife as to whether she cried during the meeting.[137] The wife asserted that she did cry as she was emotionally overwhelmed by the execution of her will, and the attorney maintained that she did not cry during the process of the making of the will. The attorney attempted to elicit this information to prove the wife was fully cognizant of the provisions of the marital property agreement at the time she made her will. The wife, however, took the position that she was not aware of the provisions of

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130. *Id.*
131. *Id.*
132. *Id.* at 735.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

the marital property agreement and did not understand its scope.

The Indiana Supreme Court found that the attorney's statement that the wife did not cry during the meeting was information relating to the prior representation of the wife.[138] The court found that a lawyer had a legal and ethical duty to maintain confidences and secrets of a client both during and subsequent to the attorney-client relationship.[139] The court found that the attorney violated Rules 1.9(b) and 8.4(a).[140]

In assessing an appropriate disciplinary sanction, the court examined several relevant factors. Among these were the nature of the misconduct, the actual or potential injury flowing from the misconduct, the state of mind of the attorney, the duty of the court to preserve the integrity of the profession, the potential injury to the public in permitting the attorney to continue in the profession, and matters in mitigation or aggravation of the misconduct.[141] In aggravation, the court stated that the attorney had violated a fundamental tenet of the lawyer-client relationship, that being loyalty.[142] "One of the cornerstones of competent legal service is an attorney-client relationship wherein the client is assured of having confidences kept and loyalties preserved."[143] At the very least, there was an appearance that the attorney had used confidential information of a former client to make himself more valuable to a subsequent adverse client.[144] The court also recognized that the attorney's conflict appeared to be an isolated occurrence and that he had never been previously subjected to any disciplinary proceedings.[145] This indicated to the court that the attorney was not a continuing threat to the public or to the profession and that a public reprimand was an appropriate sanction.[146]

D. Criminal Convictions

1. In re Stults.—In *In re Stults*,[147] Count I of the verified complaint charged the attorney with violating Rule 8.4(b) by engaging in criminal acts that "reflect adversely upon his honesty, trustworthiness or fitness as a lawyer in other respects."[148] This criminal act was possession of cocaine. On February 1, 1992, the attorney was charged in Lake Superior Court with possession of cocaine in excess of three grams, a Class C felony. On February 10, 1992, the attorney was charged once again in Lake Superior Court with possession of cocaine in excess of three grams. On January 8, 1993, both cases were amended to include

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138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 736.
145. *Id.*
146. *Id.*
147. 644 N.E.2d 1239 (Ind. 1994).
148. *See* INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1987).

conspiracy to possess cocaine. The initial charge was dropped when the court found the evidence seized was inadmissible for the lack of a proper search warrant.[149] On April 22, 1994, the attorney entered a plea of guilty to the amended charge of possession of cocaine, a Class D felony, and the charge of conspiracy was dropped.[150] The attorney was sentenced to two years at the Indiana Department of Corrections with one year suspended and one year probation.[151]

Under the former Disciplinary Rules, specifically Rule 1-102(A)(3), (5) and (6), the Indiana Supreme Court had found that possession of cocaine constituted moral turpitude and conduct prejudicial to the administration of justice, thus reflecting adversely on the attorney's fitness to practice law.[152] The court had not yet specifically decided whether possession of cocaine constitutes a criminal act that adversely reflects on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, as prohibited by Rule 8.4(b).[153]

Rule 8.4(b) states that a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law, and the analysis of criminal conduct under the current rules no longer involves reference to moral turpitude.[154] The court "must now determine if there is a nexus between the criminal act and one of the three personal qualities set forth in Prof.Cond.R. 8.4(b), to-wit: honesty, trustworthiness, or fitness as an attorney."[155] In *In re Stults*, the court found that Rule 8.4(d) closely parallels former Discipline Rule 1-102(A)(6), which prohibited conduct adversely reflecting on a lawyer's fitness to practice law.[156] Therefore, the court concluded that prior cases involving issues of fitness in relation to criminal acts were applicable to an analysis of the present rule.[157]

The court determined that possession of cocaine involved participation in an illegal transaction.[158] The court also found it important that after having been released from one charge for possession, the attorney was arrested for a second offense.[159] The court believed the second offense suggested that the attorney was addicted to cocaine.[160] The Indiana Supreme Court found that this "clearly established that respondent could not be trusted to keep his clients' secrets, give effective legal advice, fulfill his obligations to the courts and so on."[161]

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149. *In re Stults*, 644 N.E.2d at 1240.
150. *Id.* at 1240-41.
151. *Id.* at 1241.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*

Accordingly, the court concluded that the attorney had violated Rule 8.4(b).[162]

Count II of the verified complaint also charged the attorney with violating Rule 8.4(b) for the commission of a criminal act, operating a vehicle while intoxicated. The attorney pled guilty to this charge, was sentenced to one year in jail, 361 days of which was suspended, and the attorney was placed on probation for one year.[163] At the time of the attorney's arrest, he was a fugitive from justice. The court concluded this pattern of conduct indicated that the attorney was not fit to represent clients and found that the attorney had violated Rule 8.4(b).[164]

The court recognized several mitigating factors regarding the attorney's chemical dependency.[165] The chemical dependency started during a time of personal marital problems.[166] Operating a motor vehicle while intoxicated came during a period of time when the attorney was separated from his family.[167] As a result of these acts, the attorney resigned from his father's law firm.[168] The court also found that the attorney realized that he had brought shame and humiliation upon his family name, upon his father and brothers who also practiced in the firm, and upon the legal profession as a whole. The attorney appeared to be remorseful for his conduct.[169] The court suspended the attorney for six months without automatic reinstatement.[170]

2. *In re Wright.*—In *In re Wright*,[171] the parties submitted to the Indiana Supreme Court an agreed statement of circumstances and conditional agreement for discipline. Therein, it stated that on April 25, 1994 the attorney was charged in the Allen Superior Court on two counts of possession of cocaine and failure to pay the substance excise tax, Class D felonies.

On August 17, 1994, pursuant to a plea agreement, he was sentenced to a Class A misdemeanor, received one year suspended sentence and was placed on one year of probation.[172] Upon his arrest, the attorney admitted to being addicted to and dependent upon alcohol and drugs.[173] The Indiana Supreme Court cited the case of *In re Stults*,[174] finding that the possession of cocaine reflected adversely on the attorney's fitness to practice law.[175] The statement submitted by the Commission and the attorney agreed upon a six-month period of suspension with part of that period conditionally stayed, followed by a two-year probationary

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162. *Id.*
163. *Id.*
164. *Id.* at 1242.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. 648 N.E.2d 1148 (Ind. 1995).
172. *Id.* at 1149.
173. *Id.*
174. 644 N.E.2d 1239 (Ind. 1994).
175. *In re Wright,* 648 N.E.2d at 1150.

period. The supreme court accepted this suspension citing the many mitigating factors the parties had stipulated to.[176] The supreme court found that the attorney's willingness to admit his wrongdoing, to acknowledge the chemical and alcohol dependency leading to his professional misconduct and to seek relevant medical and professional treatment in rehabilitative programs to be among the most important of the mitigating factors.[177] The Commission and attorney also stipulated that the attorney's misconduct had no adverse effect on any client. The court recognized that no harm had befallen the client, however, it was not controlling in the matter.[178] In approving the agreed upon six month suspension, the court specifically set out a detailed list of the conditions to which the attorney had to adhere.[179]

E. Misuse Of Client Funds

1. In re Frosch.—In *In re Frosch*,[180] the attorney was charged with violating Rules 1.15, 8.4(b), 8.4(c) and 8.4(d). The charges arose from two counts alleging that the attorney mishandled client funds. Count I of the verified complaint alleged that on December 18, 1990, the attorney deposited into his client trust account the sum of $17,667.18, which belonged to an elderly resident in a nursing home who had inherited the money. The client's family was unsure how to handle the inheritance and entrusted it to the attorney with the understanding that he would pay out whatever sums were necessary for the benefit of the elderly nursing home resident. The attorney wrote numerous checks from the trust account to pay his personal and business expenses totally unrelated to the client.

Between December 1990 and July 1991, the attorney spent at least $20,000.00 of client funds for his personal expenses. The expenses included numerous rent obligations, various insurance policies, his mortgage, several utility bills, personal loan obligations, and his credit card bills. On January 29, 1991, the balance in his trust account dropped below $17,667.88. However, he continued to write checks on the client trust account for personal expenses. On March 4, 1991, the balance in the attorney's trust account once again dropped below $17,667.88, and from that date until July 7, 1991, the balance in the account remained below the amount of the elderly client's funds, falling to a low of $296.33 on June 13, 1991.

On July 7, 1991, the attorney deposited into the trust account a settlement check belonging to two other clients in the amount of $52,000.00. This deposit brought the balance in the attorney's trust account above $17,667.88 for the first time since March of 1991. The attorney challenged the findings of the Disciplinary Commission, stating that the Commission had ignored evidence that funds which should have been placed into the account were diverted by others and that various amounts had been spent by the elderly beneficiary of the

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176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 1151.
180. 643 N.E.2d 902 (Ind. 1994).

inheritance.[181]

The supreme court found that the hearing officer had heard and observed all the witnesses and their exhibits and had carefully weighed all of the arguments.[182] The court examined the record and concluded that the hearing officer's findings properly reflected the evidence presented at the hearing.[183] The evidence was uncontroverted that the attorney used his client funds to satisfy his personal obligations.[184] Out of the deposit of the $17,667.18 into his trust account, the attorney depleted the account to a point where a check he wrote for $900.00 was returned due to insufficient funds. The court found that "[t]his was not the result of a rare lapse in judgment but was Respondent's established method and means for paying his personal financial obligations."[185]

In Count II of the complaint, the attorney admitted that he failed to remit to his clients the interest earned on their funds deposited in the client trust account at Union Federal Savings Bank.[186] This failure constituted conversion of client's funds, a criminal act in violation of section 35-43-4-3 of the Indiana Code and further adversely reflected on his honesty, trustworthiness and fitness as a lawyer in violation of Rule 8.4(b).[187] It was also a violation of Rule 1.15 because the attorney had failed to hold client funds separate from his own.[188]

The Indiana Supreme Court recognized that it is misuse of client funds which reflects most unfavorably upon the legal profession.[189] The court also noted that the attorney had been previously suspended for sixty days for violating Rule 1.15.[190] The court held this aggravating factor to strongly indicate that the attorney was incapable of conforming to the Rules of Professional Conduct, and the court concluded that disbarment was clearly warranted in this case.[191]

2. In re Lustina.—In *In re Lustina*,[192] on May 3, 1991, the attorney received $15,000.00 in insurance settlement checks on behalf of his clients. Pursuant to a contingent fee arrangement with the clients, the attorney was to receive one-third of the settlement, leaving the clients with a net recovery of $10,000.00. The attorney deposited the entire $15,000.00 into his trust checking account on May 3, 1991. Between the May 3, 1991 and July of 1991, the attorney deposited various personal funds into the same trust account, and also used funds from that account for payment of his personal expenses. Also during this period, the balance of the trust account dropped below the $10,000.00 amount that he owed

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181. *Id.* at 903.
182. *Id.* at 904.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. 647 N.E.2d 317 (Ind. 1995).

to his clients. On July 19, 1991, the attorney paid to his clients the $10,000.00 that he owed them, this money having been provided to him by a third party.

The agreed statement of facts explained that in January of 1992 the attorney wrote a bad check to a restaurant in the amount of $446.38 and failed to reimburse the restaurant. Based upon this failure to reimburse the restaurant, the restaurant filed suit and obtained a default judgment against the attorney.[193] The statement of facts reflected that the attorney's clients expressed their utmost satisfaction with his legal representation and were not the initiators of the request for investigation by the Commission.[194] The clients stated that they agreed to wait until July 1991 to receive their share of the settlement proceeds.[195] However, they did not authorize the attorney to use their settlement proceeds to pay his personal expenses.[196] The attorney was unable to produce or locate a copy of the cashier's check he used to pay his clients or to locate the file relating to the clients' representation.

The court looked at the following mitigating facts: the attorney had never before been the subject of any disciplinary grievance; the attorney had gone through a period of substantial financial hardship; the attorney contributed time and efforts to a number of civic and legal organizations including his local bar association.[197]

The court agreed that the facts stated in the agreement between the Commission and the attorney clearly established that the attorney had commingled client funds with his personal funds in violation of Rule 1.15(a).[198] He also knowingly made a false statement of material fact in connection with the disciplinary matter in violation of Rule 8.1(a).[199] His failure to keep complete records for five years after termination of the representation of a client was in violation of Rule 1.15(a).[200] His use of his clients' funds constituted a criminal act in violation of Indiana Code section 35-43-4-3 and thus violated Rules 8.4(b) and 8.4(c).[201]

The agreement between the attorney and the Disciplinary Commission stated that an appropriate suspension in the case would be for the period of one year, after which the attorney could seek reinstatement to the practice of law.[202] The Indiana Supreme Court found that this was an appropriate suspension and therefore approved the agreement tendered by the parties.[203] Accordingly, the attorney was suspended from the practice of law for a period not less than one

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193. *Id.*
194. *Id.* at 318.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

year beginning April 6, 1995, without automatic reinstatement.[204]

3. In re McLin.—In *In re McLin*,[205] the attorney was retained by Dora Haskett to represent her in a personal injury case in May 1990. The attorney and his client agreed upon a contingency fee arrangement. The attorney subsequently negotiated a $3,000.00 insurance settlement on his client's behalf. On December 17, 1991, the attorney deposited the settlement proceeds into his personal checking account at the Indiana National Bank. After his deposit, the balance in the account was $5,714.07. On December 30, 1991, the attorney wrote Haskett a check for $2,000.00 drawn on his personal account. On January 13, 1992, Haskett deposited the check into a savings account at the Union Federal Savings Bank. When she tried to withdraw funds from the account she was informed that the check had been returned due to insufficient funds in the attorney's account. On February 19, 1992, the attorney drew a check on his attorney trust account in order to purchase a cashier's check payable to Union Federal, to cover the returned check.

When the attorney's misconduct first came to light he claimed that his account had been short "a few scant dollars." In fact, the account was over $1,000.00 short of being able to satisfy Haskett's check. The attorney's trust account and his personal checking account contained various mixtures of his personal funds and his client's funds. The Indiana Supreme Court found that the agreed upon facts established that the attorney had violated Rule 1.15(a) in that the attorney deposited client funds into his personal checking account that involved the commingling of client and personal monies.[206] The attorney also violated Rule 1.15(b) by neglecting to reimburse Haskett for the returned check for a period of over one month, and by failing to promptly deliver funds to a client who was entitled to those funds.[207] The attorney violated Rule 8.4(b) by making use of the funds belonging to Haskett to finance his personal expenditures.[208] The Indiana Supreme Court also found that his various misrepresentations to the Commission during the investigation of the matter led to a violation of Rule 8.1(a).[209]

In deciding upon the appropriate sanction, the court looked at various mitigating factors. The attorney had no prior disciplinary record and had no motive to deprive Haskett of the money permanently.[210] He had expressed some remorse about the incident, and Haskett did not suffer any significant financial injury as a result of being temporarily deprived of the use of her funds.[211] The supreme court agreed with the suggested sanction and ruled that McLin be suspended from the practice of law in the State of Indiana for a period of not less

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204. *Id.*
205. 644 N.E.2d 100 (Ind. 1994).
206. *Id.* at 102.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*

than thirty days.[212]

F. Neglect Of Client Matters

1. In re Brown.—In *In re Brown*,[213] the attorney was retained by a client in September of 1992 to represent him in an action brought by the client's former spouse seeking past due child support payments. Additionally, the former spouse petitioned the court to attach an inheritance due to the client, for the purpose of satisfying the alleged past due child obligation. After two continuances, the matter was finally scheduled for a hearing to be held on November 6, 1992. The attorney failed to notify his client of this hearing. He also failed to investigate the client's claims that the client's former wife was motivated in her efforts to attach the inheritance not by a concern for the children but to alleviate her own financial misfortune. The attorney did not attempt to discover whether his client had actually made payments directly to his former wife as the client claimed. Neither the attorney nor his client appeared at the November 6 hearing.

On November 12, 1992, the court entered judgment in the amount of $26,860.00 against the client, and the attorney failed to inform his client of this judgment. The client learned of this adverse ruling from his daughter. Between November 12, 1992 and December 10, 1992, the attorney collected various information from the client relating to his claims and contentions, and incorporated this information into a motion to correct error, which he filed on December 10, 1992. The court denied the motion on December 21, 1992 and set a hearing date of January 22, 1993, to hear argument pertaining to the petition to attach the client's inheritance. The attorney acknowledged the hearing date in a letter dated January 11, 1993, but failed to appear at the hearing due to his involvement in another trial that day. The client attempted to represent himself at the hearing, resulting in the inheritance being attached to satisfy the earlier judgment.[214]

Throughout the representation, the attorney relayed information about the case to the client through the client's sister, despite the fact that the attorney had his client's toll free work telephone number. As a result of this arrangement, the client did not often receive prompt answers to questions that he had posed concerning the case.

The court concluded that the attorney had violated Rule 1.1 by failing to provide competent representation; the court stated that the attorney had also violated Rule 1.3 by the attorney's failure to act with reasonable diligence and promptness during the course of the representation.[215] The attorney violated Rule 1.4(a) by his failure to keep the client reasonably informed about the status of the matter and to promptly comply with requests for information.[216] He violated Rule 1.4(b) by the his failure to explain matters to the extent reasonably necessary to

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212. *Id.*
213. 646 N.E.2d 664 (Ind. 1995).
214. *Id.* at 666.
215. *Id.*
216. *Id.*

permit his client to make an informed decision.[217] The attorney and the Disciplinary Commission had agreed upon a sanction of a public reprimand which the court instituted.[218]

2. *In re Cushing*.—In *In re Cushing*,[219] the attorney was charged in a two count verified complaint. The basic nature of the allegations was that the attorney failed to represent his clients with sufficient diligence. In June 1987, the attorney was contacted by two clients regarding possible legal action regarding the death of their dog. In October 1986, the clients boarded their dog in a kennel and told the employees that the dog was diabetic. The employees allegedly neglected to feed the dog causing it to lapse into a coma. The dog ultimately died. The clients incurred significant veterinary expenses in unsuccessful attempts to treat it.

In January 1988, the attorney met with the clients to discuss filing suit and seeking an insurance settlement against the kennel. The attorney informed the clients that he would take their case on a contingency fee basis, although no written agreement was signed. Between January 1988 and June 1992, the attorney wrote two letters to the kennel's insurance carrier regarding the settlement. The attorney failed to inform the clients that the insurance carrier was unwilling to settle. The clients made approximately twenty attempts to reach the attorney by telephone. When they finally reached the attorney, he indicated that the time to pursue the case was running out and that he was pursuing the matter. The clients were left with the impression that documentation necessary to preserve their claim had been filed. Ultimately the attorney failed to file suit on behalf of his clients or to negotiate a settlement with the insurance carrier. He did not advise the clients that he no longer wanted to represent them, he failed to advise them to seek other counsel and he did not return their file in a timely manner.

The court found that this conduct violated Rule 1.3 in that the attorney failed to act with reasonable diligence and promptness when representing his clients.[220] He also violated Rule 1.4(a) by failing to keep his clients reasonably informed about the status of their case and by failing to promptly comply with reasonable requests for information.[221]

In January of 1990, the attorney was retained by another client in regard to a dissolution action. The attorney filed a petition for dissolution in the Marion Superior Court on February 5, 1990, and on February 13, 1990, the client's wife filed a petition for dissolution in the Superior Court of California. On February 23, 1990, the attorney sent a motion to dismiss to the California court. In this motion he asserted that the wife did not meet the California residency requirements and as such, her petition for dissolution should be dismissed in the California court. The attorney was not licensed to practice law in the State of California nor had he secured the assistance of local counsel. For various reasons the California court refused to accept the pleading and in order to accept the

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217. *Id.*
218. *Id.*
219. 646 N.E.2d 662 (Ind. 1995).
220. *Id.* at 663.
221. *Id.*

motion, the California court requested an $88.00 first appearance fee. The attorney received the money for the fee from his client on March 15, 1990, but did not resubmit the motion.

The wife requested a default judgment from the California court, and the attorney was notified on April 6, 1990. The attorney failed to inform his client and a default judgment was entered on behalf of the wife on August 24, 1990.[222] In October, the attorney's client received a copy of the order granting the divorce. The client then paid the attorney $1,000.00 to continue the representation and an additional $1,500.00 on January 1, 1991. Five hundred dollars of the $1,500.00 was intended to retain local counsel in the State of California, but the attorney never retained local counsel. On December 17, 1991, the client, by letter, terminated the representation and demanded the return of the unearned fees. The attorney did not respond to this letter. After an additional letter had gone unanswered, the client filed a grievance against the attorney with the Disciplinary Commission, and following the filing of the grievance, the attorney returned $1,588.00 to the client.

The Indiana Supreme Court found that the attorney's attempt to file a motion in the California court when not licensed to practice law in that state, was in violation of Rule 5.5(a), which provides that a lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.[223] The court concluded that the attorney failed to take significant action on behalf of his client for a period of four and one-half years, and the attorney's less than diligent representation in the second count resulted in a default judgment being entered against his client.[224] The court stated that in both instances his client's substantive legal rights were adversely affected or threatened by the attorney's conduct.[225] The court suspended the attorney for a period of thirty days beginning on March 17, 1995.[226]

3. In re Dils.—In *In re Dils*,[227] the charges against Dils arose out of his representation of two estates. The attorney and the Disciplinary Commission agreed upon a resolution of this matter and presented it to the Indiana Supreme Court for its approval. Approving the agreement, the court held that the attorney had engaged in misconduct and that a public reprimand was an appropriate sanction.[228]

On May 31, 1989, the attorney was named the personal representative of an estate. In early 1991, the court discovered that the attorney had taken no action since March 15, 1990, and that the estate remained open. After a subsequent hearing, the attorney stated that he would file an accounting and closing statement to conclude the estate by March 28, 1991. The court ordered that all documents

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222. *Id.*
223. *Id.* at 664.
224. *Id.*
225. *Id.*
226. *Id.*
227. 646 N.E.2d 667 (Ind. 1995).
228. *Id.* at 669.

be filed no later than April 1, 1991, and ordered the attorney to appear in court that day.[229] The attorney failed to file any documents on or before April 1, 1991.

On August 30, 1991, the court ordered the attorney in his capacity as personal representative of the estate, to pay $19,601.52 to Central State Hospital for care of the estate's deceased mother.[230] On April 10, 1992, the court removed the attorney as personal representative and ordered him to file an inventory and financial accounting within ten days.[231] The attorney failed to file an accounting or other documentation within ten days; he also failed to appear to explain his actions. The attorney did not provide his successor personal representative with an inventory or accounting and neglected to forward the file or assets of the estate until approximately one year after the attorney's removal as personal representative.

The court concluded that the attorney had failed to diligently administer or ultimately close the estate and therefore he had violated Rule 1.3.[232] By failing to turn over the case to his successor personal representative until approximately one year after the attorney's removal as personal representative, the attorney had also violated Rule 1.16(d).[233]

Count II of the complaint stemmed from the attorney's representation of an estate opened on November 12, 1991. The court supervising the administration of the estate appointed the attorney as the estate's attorney, and the court appointed the decedent's daughter as the estate's executor. On December 3, 1991, the decedent's widow filed an election to take against the will. Beginning September 3, 1991, the widow's attorney attempted to contact the attorney to negotiate the claims filed against the estate. From November 12, 1991, until March 1993, the attorney failed to file an accounting or inheritance tax return and failed to otherwise properly close the estate. The attorney also failed to respond to the widow's request regarding her election.

The Indiana Supreme Court noted that the attorney had been privately reprimanded by the court once before.[234] However, the Disciplinary Commission and the attorney had agreed that there was no selfish motive fueling the attorney's misconduct, and that the attorney had in good faith attempted to rectify the consequences of his misconduct by eventually turning over the estate files to his successor counsel.[235] The court concluded that the sanction of a public reprimand was appropriate in this case.[236]

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229. *Id.* at 668.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 669.
235. *Id.*
236. *Id.*

CONCLUSION

During this survey period, the law of professional responsibility, particularly the organization and procedural aspects, was dramatically revised. The Indiana practitioner must follow very specific account management regulations for trust and escrow accounts. What one might have previously considered to be sound business practice in maintaining detailed trust account records is now mandated by the Indiana Supreme Court; accounts will be monitored by the financial institutions and the Disciplinary Commission will receive reports of any mismanagement. The court has allowed sufficient time for all lawyers and law firms to comply, but it will be up to the practitioner to educate him or herself and follow this directive.

The comments lawyers are permitted to make during the course of legal proceedings are subject to the supreme court's scrutiny. The press conferences and sound bites to which we have become accustomed may be sanctionable in Indiana. The practitioner should be familiar with Rule 3.6, and guard against violative public statements during the investigation or pendency of a case.

In an effort to increase the awareness of the Bar on these and other ethics issues, there is now a mandatory continuing legal education requirement to attend sessions on ethics. The requirement of three hours on ethics over a three year period should be relatively easy for practitioners to attain.

The disciplinary process has been changed, beginning with the constitution of the Disciplinary Commission to include non-lawyer members, the increase in the enforcement of powers of the Executive Secretary and the Commission, and the addition of a new sanction, the administrative admonition, to name the more significant modifications. The availability of this new measure of discipline could result in an increase in attorney discipline cases if the Commission does not dismiss matters that previously did not warrant a private reprimand. Those lawyers practicing in the field of professional responsibility, or who find themselves the object of a grievance, should be advised of the availability of the administrative admonition as a vehicle for resolving attorney discipline cases without publicity.

1995 DEVELOPMENTS IN PROPERTY LAW*

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I. NONPROBATE TRANSFERS: MUTLI-PARTY ACCOUNTS

In *Parke State Bank v. Akers*,[1] Harold Akers and his wife, Ardith kept certificates of deposit ("CDs") in a jointly owned safety deposit box in the Parke State Bank ("the Bank"). The CDs were issued in the names of Harold Akers or Ardith Akers or Survivor.[2] Harold, who was hospitalized with cancer, wanted his daughter, Deborah Hopkins, to have access to the safety deposit box so that she could remove the CDs. He telephoned the president of the Bank and was advised that written authorization would be required.[3] Harold gave Deborah written authorization, and the Bank allowed her access to the deposit box, where, at Harold's direction, she removed four CDs totaling $35,000.[4]

Harold, without Ardith's knowledge or consent, subsequently endorsed the CDs, instructed Deborah to cash them, and then distribute the money to herself and two of Harold's grandchildren.[5] Harold died a few weeks after Deborah cashed and distributed the proceeds of the CDs. After discovering this disbursement, Ardith brought an action against the Bank for breach of the safety deposit box rental agreement.[6] The rental agreement expressly stated that the safety deposit box could only be accessed by Harold or Ardith or by a deputy appointed with the consent of both parties.[7] The trial court entered judgment in

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1. 645 N.E.2d 1096 (Ind. Ct. App. 1995).
2. *Id.* at 1097.
3. *Id.*
4. *Id.* at 1097-98.
5. *Id.* at 1098.
6. *Id.*
7. The rental agreement provided in pertinent part:

> Unless otherwise agreed in writing, a Safe leased by two or more persons shall be held jointly and severally, and either of them, or their du[l]y appointed deputy, without consent of any other of them, is entitled to separate access to the Safe . . . .
>
> . . . .
>
> A deputy may be appointed in writing . . . but no renter may appoint a deputy without the consent of the other renter(s), if any.

Ardith's favor and the Bank appealed.

The Indiana Court of Appeals reversed the trial court's judgment and found in favor of the Bank.[8] The court emphasized that under the nonprobate transfers statute, any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.[9] Thus, the court determined that Harold had the authority to withdraw the funds from the account without the knowledge or consent of Ardith.

The court proceeded to conclude that making payment on joints accounts to one of the parties discharges the financial institution from all claims for amounts so paid.[10] The court agreed with Ardith that the Bank had violated the safety deposit box rental agreement by allowing Deborah access to the safety deposit box without Ardith's consent, but it concluded that "any pecuniary loss here necessarily depends on the Bank's liability in redeeming the certificates and issuing checks payable to persons other than the joint owners."[11] Because Harold could have personally gone to the Bank and cashed the CDs, "Deborah, acting on Harold's specific instructions, had the same authority."[12] Thus, the court concluded that the Bank could not be held liable for paying the funds to Deborah and thereby reversed the judgment of the trial court.[13]

Agreeing with the trial court's judgment in favor of Ardith, Judge Barteau dissented. She emphasized that the majority overlooked or ignored the fact that but for the Bank's breach of the safety deposit agreement, Deborah would not have gained access to the CDs, and the funds still would have been held jointly at Harold's death. Judge Barteau argued that because of the Bank's breach, Ardith was denied possession of the CDs and the funds they represented.[14]

The Indiana Supreme Court granted transfer, and in a decision authored by recently appointed Justice Myra Selby, the Court reversed the Court of Appeals and determined that the Bank was liable to Ardith for breach of contract.[15] The court determined that the essential question of this case was "whether the Bank's breach of contract resulted in cognizable damages to Ardith."[16]

Rejecting the Bank's contention that it should be relieved of liability because the CDs eventually came into possession of a rightful owner, Harold, the court determined that at the time of the Bank's breach of contract, Ardith had two identifiable interests in the CDs: (1) constructive possession based upon her access to the safety deposit box; and (2) a contingent beneficial interest as a donee-

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Id. at 1097 (quoting Record at 182).

8. *Id.* at 1100.
9. *Id.* at 1099 (citing IND. CODE § 32-4-1.5-9 (1993)).
10. *Id.* (citing IND. CODE § 32-4-1.5-12 (1993)).
11. *Id.* at 1098.
12. *Id.* at 1099-1100.
13. *Id.* at 1100.
14. *Id.*
15. Parke State Bank v. Akers, 659 N.E.2d 1031 (Ind. 1995).
16. *Id.* at 1034.

beneficiary of the CDs because CDs, which are contracts, created a third party beneficiary right with right of survivorship.[17] The court indicated that when the Bank breached the contract, it destroyed Ardith's present possessory interest in the CDs.[18] This present possessory interest, the court explained, "should have assured her that her contingent beneficial interest in the CDs would ripen into sole ownership of the certificates upon Harold's imminent death."[19]

The court then examined whether the Bank's breach of contract was the cause in fact of Ardith's loss. The Bank argued that Harold's subsequent endorsement of the certificates and distribution to the other family members was the true cause of the loss.[20] While the court noted that this may have contributed to Ardith's losses, Indiana does not recognize comparative causation in breach of contract claims.[21] Accordingly, the court concluded that the Bank's breach was a substantial factor in bringing about Ardith's damages, and that the trial court's measure of damages, $35,000 plus statutory interest, was proper.[22]

Chief Justice Shepard, joined by Justice DeBruler, dissented, noting that the Bank merely responded to the deathbed request of a customer when it allowed Deborah to retrieve the CDs for her father. He indicated that the Bank should not be punished for its good samaritanship as it was Harold's change of heart, not the Bank's, which caused Ardith's lost expectancy.[23]

The Indiana Supreme Court decision ignores the Court of Appeals analysis under the nonprobate transfers statute.[24] Moreover, the court did not address an important subissue of the Court of Appeals decision involving the conflict between the Indiana Supreme Court's decision of *Shourek v. Stirling*[25] and the language used by the Indiana Court of Appeals in both *Voss v. Lynd*[26] and *Graves v. Kelley*.[27]

In *Parke State Bank*, Judge Rucker of the Indiana Court of Appeals indicated in a footnote that if this case had involved an action against Harold's estate, then the authority to withdraw the funds would not have necessarily relieved his estate of liability.[28] He stated, "[e]ven where both parties have authority to draw out all the money from an account, one of two joint tenants of money deposited in a joint bank account cannot, by withdrawing the money without the other's knowledge

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17. *Id.* at 1034 (citing *In re* Estate of Fanning, 315 N.E.2d 718, 720-21 (Ind. Ct. App. 1974)).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 1035 (citing Fowler v. Campbell, 612 N.E.2d 596, 602 (Ind. Ct. App. 1993)).
22. *Id.*
23. *Id.*
24. IND. CODE §§ 32-4-1.5-1 to -15 (1993).
25. 621 N.E.2d 1107 (Ind. 1994).
26. 583 N.E.2d 1239 (Ind. Ct. App. 1992).
27. 625 N.E.2d 493 (Ind. Ct. App. 1993).
28. Parke State Bank v. Akers, 645 N.E.2d 1096, 1099 n.1. (Ind. Ct. App. 1995).

and consent, divest the other of his joint ownership therein."[29] This appears to conflict with *Shourek* wherein the Indiana Supreme Court held that under section 32-4-1.5-3(a) of the Indiana Code,[30] a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to sums of deposit, and if one party contributes all the funds, those funds belong to that person during his lifetime, unless clear and convincing evidence of a contrary intent is established.[31]

Moreover, under section 32-4-1.5-4(a) of the Indiana Code,[32] only sums remaining on deposit presumptively belong to the survivor. Thus, if Harold had been the sole contributor of these funds, these funds belonged to him during his lifetime, and only those funds remaining on deposit at his death would have passed to Ardith. Judge Rucker's contention that a party to a joint account cannot withdraw the money without the consent of the other party conflicts with the Indiana Supreme Court's interpretation of the multi-party account statute as set forth in *Shourek*.

II. LANDLORD AND TENANT

A. Holdover Tenant

In *Houston v. Booher*,[33] the tenant, Houston, a dentist, entered into an agreement to purchase part of Booher's dental practice and to sublet a portion of his office space for a three-year term ending May 31, 1993. The sublease contained an option to renew for an additional two-year term, but required Houston to exercise the option in writing at least ninety days prior to the expiration of the term.[34] Houston did not exercise the option until March 10, 1993, seven days after the time set forth in the sublease agreement for notice of intent to renew. Nevertheless, when Houston remained in possession at the end of the term, Booher accepted Houston's rental payments for June and July at an increased rate as provided in the original sublease.[35]

On September 3, 1993, Booher filed a "Notice of Claim for Possession of Real Estate" in small claims court, alleging that he was entitled to eject Houston because Houston had failed to give timely notice of his intent to renew the sublease.[36] After the case was transferred to municipal court, both parties moved for summary judgment. The trial court granted Booher's motion, denied Houston's motion, and ordered Houston to pay attorney fees pursuant to the

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29. *Id.* (quoting Rogers v. Rogers, 437 N.E.2d 42 (Ind. Ct. App. 1982)).
30. IND. CODE § 32-4-1.5-3(a) (1993).
31. Shourek v. Stirling, 621 N.E.2d 1107, 1110 (Ind. 1994).
32. IND. CODE § 32-4-1.5-4(a) (1993).
33. 647 N.E.2d 16 (Ind. Ct. App. 1995).
34. *Id.* at 17.
35. *Id.* at 18.
36. *Id.*

sublease agreement. Houston appealed.[37]

On appeal, Houston contended that when he held over after the expiration of the term and Booher accepted the rent payments the sublease was extended for an additional one year period.[38] Booher countered that when a tenant holds over beyond the lease term he becomes a tenant from month to month.[39]

The Indiana Court of Appeals explained that when a lessee under "a lease for a definite term holds over after the expiration of that term, the lessor has the option of treating the lessee as a tenant or a trespasser."[40] The court stated that when a tenant holds over beyond the expiration of the lease and continues to make rental payments, and the landlord unconditionally accepts these rental payments, the parties are deemed to have continued the tenancy under the terms of the expired lease.[41] However, the court noted that when the original term of a lease is for a period of more than one year, the duration of the renewal period will be only for one year at a time.[42] Thus, the court determined that when Houston held over after the expiration of the sublease, Booher did not treat him as a trespasser by evicting him, but accepted his rent payments. Consequently, Houston continued his tenancy under the terms of the expired sublease agreement.[43]

Booher also relied upon section 32-7-1-2 of the Indiana Code[44] to support his claim that Houston held over as a tenant from month to month. That code section provides: "[A]ll general tenancies . . . in which premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from month to month."[45] The court determined that section 32-7-1-2 was not applicable in a holdover tenancy, because when a tenant holds over at the end of a fixed term with the consent of the landlord, a new tenancy is created, "not general or from year to year, but certain in point of time—one year—so fixed by the agreed notice to quit."[46] This new tenancy is for a certain period of time, one year.[47] Therefore, the court concluded that despite the notice of renewal stipulated

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37. *Id.*

38. *Id.* at 19.

39. *Id.*

40. *Id.* (citing Mooney-Mueller-Ward, Inc. v. Woods, 371 N.E.2d 400, 403 n.1 (Ind. Ct. App. 1978); Burdick Tire & Rubber Co. v. Heylmann, 138 N.E. 777, 778 (Ind. Ct. App. 1923)).

41. *Id.* (citations omitted).

42. *Id.* (citing Marcus v. Calumet Breweries, Inc., 73 N.E.2d 351 (Ind. Ct. App. 1947)).

43. *Id.* The court recognized Carsten v. Eickhoff, 323 N.E.2d 664 (Ind. Ct. App. 1975), which held that where notice of renewal or extension is stipulated in the lease agreement, notice must be given. However, the court found *Carsten* distinguishable, as it did not address the case where there is a lease which calls for a higher rent during the second term and the lessor holds over without objection and pays the higher rent. *Houston*, 647 N.E.2d at 19 n.5.

44. IND. CODE § 32-7-1-2 (1993).

45. *Houston*, 647 N.E.2d at 20 (quoting IND. CODE § 32-7-1-2 (1993)).

46. *Id.* (quoting Walsh v. Soller, 191 N.E. 334, 335 (Ind. 1934)).

47. *Id.* The court also relied upon Marcus v. Calumet Breweries, Inc., 73 N.E.2d 351 (Ind. Ct. App. 1947), to support the conclusion that the facts created a tenancy for one year. In so doing, the court rejected Booher's argument that the *Marcus* court misapplied the rule set forth by the

in the lease, Booher accepted Houston's tender of the increased rent for two months pursuant to the renewal terms in the lease which extended the tenancy for a new term of one year.[48]

Booher also argued that because Houston held over for a limited purpose of negotiating a new lease, he did not become a tenant for another year, but became a tenant from month to month or for a lesser period.[49] Although the court agreed with Booher that a landlord may allow a tenant to hold over on terms and conditions different from the original lease, the court found no evidence of an agreement between Booher and Houston to a new or different tenancy.[50] Accordingly, the court concluded that the trial court erred in granting Booher's motion for summary judgment and in denying Houston's motion for summary judgment, as Houston's lease was extended for a period of one year.[51]

The court also addressed the trial court's award of attorney fees to Booher based upon a purchase agreement incorporated by reference into the sublease. The agreement provided that in the event of a default or breach, the defaulting party shall pay all expenses including attorney fees.[52] Based upon its determination that Houston had become a holdover tenant for a new term of one year, the court reversed the trial court's award of attorney fees to Booher.[53]

Finally, the court rejected Houston's claim that he was entitled to attorney fees from Booher. Booher's action to evict Houston for failure to give notice of renewal, while unsuccessful, was not a default under the purchase agreement.[54] Thus, the court rejected Houston's claim for attorney fees.[55]

B. Breach of Implied Warranty of Habitability: Tort Liability

In *Johnson v. Scandia Associates, Inc.*,[56] the tenant, Terri Johnson ("Johnson"), brought an action against the landlord, Scandia Associates, Inc. ("Scandia"), and the landlord's property management company, Oxford Management Co. ("Oxford"), for injuries suffered from an electrical shock when Johnson simultaneously touched the oven and the refrigerator in her apartment.

Indiana Supreme Court in *Walsh*. *Houston*, 647 N.E.2d at 20.

48. *Houston*, 647 N.E.2d at 21.

49. *Id.*

50. *Id.* (rejecting Booher's reliance upon Hoffman v. McCollum, 93 Ind. 326 (1884); Bright v. McQuat, 40 Ind. 521 (1872); and Burdick Tire & Rubber Co. v. Heylmann, 138 N.E. 777 (1923) (in all three cases, the landlord and tenant expressly agreed to a fixed period of time the tenant could remain on the premises)).

51. *Id.* at 21-22. In conclusion, the court also noted that Booher failed to cite authority for the position that a tenant who holds over for the limited purpose of negotiating a new lease does not become a tenant for another year. *Id.* at 21.

52. *Id.* at 22.

53. *Id.*

54. *Id.*

55. *Id.*

56. 641 N.E.2d 51 (Ind. Ct. App. 1994).

Johnson sued under two theories: (1) negligence; and (2) breach of the implied warranty of habitability.[57] The trial court granted Scandia and Oxford's motion to dismiss Johnson's breach of the implied warranty claim and the case went to trial solely on the negligence theory. The jury found in favor of Scandia and Oxford, determining that neither were negligent.[58] Johnson then appealed the dismissal of her implied warranty of habitability claim.[59]

Assessing Johnson's implied warranty of habitability claim, the Indiana Court of Appeals set forth a brief history of the implied warranty of habitability in Indiana. Indiana courts had not recognized the implied warranty of habitability in a residential lease until 1980.[60] Subsequently, Indiana courts recognized the existence of the implied warranty of habitability in a landlord and tenant context on a number of occasions.[61] However, none of these cases held that a tenant could recover damages for personal injury under a breach of implied warranty of habitability theory. Thus, the single issue raised on appeal in *Johnson* was whether a tenant could recover damages for personal injury as well as damages for economic loss when there is a breach of the implied warranty of habitability in a residential lease.[62]

The court began its analysis with an examination of *Barnes v. Mac Brown & Co., Inc.*[63] There, the Indiana Supreme Court extended the implied warranty of habitability of a builder-vendor in the sale of a new home to the second or subsequent purchasers of the home, where the purchasers suffered damages from a hidden defect not discoverable by a reasonable inspection that manifested itself after the purchase.[64] The *Barnes* court rejected the contention that a distinction should be drawn between economic loss for damage to property and damages for personal injury.[65] Following *Barnes*, the *Johnson* court concluded: "We are likewise unconvinced that, upon a breach of the implied warranty of habitability in a residential lease, a distinction exists between recovery of damages for economic loss and recovery of damages for personal injury."[66]

The court observed that the recovery for breach of contract includes damages

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57. *Id.* at 53.

58. *Id.*

59. *Id.*

60. *See* Breezewood Management Co. v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980), *trans. denied.*

61. *See* Dawson v. Long, 546 N.E.2d 1265 (Ind. Ct. App. 1989), *trans. denied*; Hodge v. Nor-Cen, Inc., 527 N.E.2d 1157 (Ind. Ct. App. 1988), *trans. denied*; Kahf v. Charleston S. Apartments, 461 N.E.2d 723 (Ind. Ct. App. 1984), *trans. denied.*

62. *Johnson*, 641 N.E.2d at 53.

63. 342 N.E.2d 619 (Ind. 1976).

64. *Johnson*, 641 N.E.2d at 53 (citing *Barnes*, 342 N.E.2d at 620-21).

65. *Id.* at 54 (citing *Barnes*, 342 N.E.2d at 621) (emphasis omitted). The *Barnes* court stated: "Why there should be a difference between an economic loss resulting from injury to property and an economic loss resulting from personal injury has not been revealed to us." *Barnes*, 342 N.E.2d at 621.

66. *Johnson*, 641 N.E.2d at 54.

that arise naturally from the breach or within the contemplation of the parties.[67] Because the implied warranty is a promise by the landlord to avoid hidden or concealed dangers, the court determined that personal injuries caused by such conditions are within the contemplation of the parties and arise naturally as the result of the breach.[68]

The court also analogized the sale of real property to the law of sales and concluded that the sale of real property should not be treated any differently than the sale of personal property with respect to the implied warranty of habitability.[69] Under Indiana's Uniform Commercial Code, if the seller is a merchant, an implied warranty of merchantability is implied in a contract for the sale of goods, and if the goods are defective, the buyer may recover consequential damages for injury to persons or property proximately resulting from any breach of warranty.[70] The court emphasized that the warranty of merchantability applies only to a sale by a merchant; one engaged in the business of selling such goods on a regular basis.[71] Thus, the court indicated that an implied warranty of habitability would only apply to the professional landlord in the business of renting dwellings to tenants.[72] Here, the court determined that Scandia was a professional landlord in the business of renting apartments and in a better position to spread the costs of liability for personal injuries, and thus, the implied warranty applied.[73]

The court distinguished *Hodge v. Nor-Cen, Inc.*,[74] the only other Indiana decision[75] in which the tenant sought to recover damages for personal injuries resulting from the breach of an implied warranty of habitability in a residential lease. However, in *Hodge*, the court could not address the issue because the appellants had failed to present a compelling argument for the extension of the warranty.[76] Here, the court decided the issue and determined that Johnson had advanced a case to support the recovery of personal injury damages under an implied warranty theory where the injury resulted from a hidden or concealed, dangerous condition on the leased premises.[77]

The court was careful to note, however, that the ruling did not subject a residential landlord to strict liability for injury to its tenants. Instead, a tenant is required to prove that a landlord is a merchant, that there is privity of contract, and that there has been a breach of the implied warranty of habitability.[78] The court

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67. *Id.*

68. *Id.* (citing *Barnes*, 342 N.E.2d at 621).

69. *Id.* (citing *Barnes*, 342 N.E.2d at 621).

70. *Id.* (citing IND. CODE §§ 26-1-2-314(1) , 26-1-2-715(2)(b) (1993)).

71. *Id.* (citing IND. CODE §§ 26-1-2-314(1), 26-1-2-104(1) (1993)).

72. *Id.* at 55 (citing Zimmerman v. Moore, 441 N.E.2d 690, 695-96 (Ind. Ct. App. 1982) (an implied warranty of habitability does not extend to the non-merchant lessor)).

73. *Id.*

74. 527 N.E.2d 1157 (Ind. Ct. App. 1988), *trans. denied.*

75. The other case is Zimmerman v. Moore, 441 N.E.2d 690 (Ind. Ct. App. 1982).

76. *Hodge*, 527 N.E.2d at 1159.

77. *Johnson*, 641 N.E.2d at 56.

78. *Id.*

concluded that because Oxford executed the lease as the agent of Scandia, Oxford was not in privity of contract with Johnson; therefore, summary judgment was properly granted to Oxford.[79] However, the court determined that Johnson did have a claim against Scandia based on the implied warranty of habitability and thus, reversed the trial court's granting of summary judgment in Scandia's favor.[80]

Finally, on rehearing, the court withdrew language within a footnote of its opinion wherein the court interpreted *Breezewood Management Co. v. Maltbie*[81] to mean that parties to a residential lease could effectively disclaim the implied warranty of habitability.[82] The court explained:

> By "effectively disclaim," we meant only that under the facts and circumstances of a particular case, it is conceivable that a warranty of habitability would not be a reasonable expectation of the parties. In our opinion, we decided only whether a tenant could recover damages resulting from personal injury under the implied warranty of habitability in a residential lease. . . . [W]e did not decide in a footnote, whether the implied warranty of habitability can be expressly disclaimed in a residential lease. Accordingly, . . . we have withdrawn the last sentence of footnote 3 in the opinion.[83]

Thus, this decision leaves open the question of whether a landlord may disclaim any implied warranties in a residential lease. It is likely that landlords may test this point in the future by including express disclaimers in the standard lease. However, the Indiana Supreme Court has granted transfer in this case and its opinion is pending.

C. Security Deposits Statute

1. Background.—In 1989, the Indiana General Assembly enacted the Security Deposits Statute.[84] Section 12 of this statute requires that all of a security deposit held by a landlord be returned to a tenant at the termination of the rental agreement, except for amounts applied to certain specified obligations of the tenant.[85] Section 13 of the statute contains a list of the tenant's obligations for which the landlord may deduct from the security deposit.[86] If the landlord withholds any portion of the tenant's security deposit, the statute requires the landlord to give written notice to the tenant, including an itemized list of damages for which the security deposit is being applied, within forty-five days of the termination of the rental agreement and delivery of possession, and the estimated

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79. *Id.* at 56-57.
80. *Id.* at 56.
81. 411 N.E.2d 670 (Ind. Ct. App. 1980).
82. *Johnson*, 641 N.E.2d at 57.
83. *Id.*
84. IND. CODE §§ 32-7-5-1 to -19 (1993).
85. *Id.* § 32-5-7-12.
86. *Id.* § 32-5-7-13.

cost of repair for each damaged item.[87] The notice of damages must be accompanied by a check for the difference between the amount of damages claimed and the amount of the security deposit withheld.[88] Failure of the landlord to comply with the notice of damages provisions of the statute constitutes an agreement by the landlord that no damages are due, and the landlord must remit the full security deposit to the tenant.[89] If the landlord complies with the notice of damages provisions of the statute, the landlord can also recover "other damages" against the tenant.[90] Recent court decisions continue to explain and clarify the provisions of this new statute.

2. *Claims Against Security Deposits: Other Damages.*—In *Miller v. Geels,*[91] the Indiana Court of Appeals addressed several issues under the Security Deposits Statute. The facts in *Miller* reveal that four Indiana University students ("Tenants") leased a house from Donald Geels ("Landlord") in Bloomington for a one-year term ending August 14, 1992. The lease was secured by an $840.00 security deposit. Under the terms of the lease, Tenants were required to shampoo the carpet before vacating the premises, to clean certain appliances and other items in the house, and to leave the house "'in the same condition as when received, excluding reasonable wear and tear.'"[92] If they failed to do so, Tenants would be required to pay all costs of returning the rental unit to its prior condition. The lease further provided that Tenants were jointly and severally liable for any breach of the lease and were liable for any and all costs in the enforcement of the lease, including reasonable attorney fees.[93]

In April 1992, one of the tenants moved and failed to pay her share of the rent. At the end of the lease term, the unpaid rent was $1,050.00. Landlord filed suit in the small claims division of the Monroe Circuit Court against Miller and Santagata, the only tenants upon which the landlord could obtain service, for unpaid rent, late fees, and cleaning and replacement expenses. When the Indiana University Student Legal Services entered an appearance on behalf of Tenants, Landlord retained an attorney, and on the date of trial, moved to amend his complaint to include a request for attorney fees which the court allowed.[94] The trial court entered judgment for Landlord on all claims except late fees, in the amount of $1,805.00, itemized as: $1,050.00 unpaid rent; $130.00 apartment cleaning; $85.00 carpet cleaning; $80.00 replacement of bathroom carpet; and $1,300.00 attorney fees, less the $840.00 security deposit.[95] Tenants appealed.

The first issue addressed by the Indiana Court of Appeals was whether limitations on damages under the Security Deposits Statute allowed a landlord to

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87. *Id.* §§ 32-7-5-12, -14.
88. *Id.* § 32-7-5-14.
89. *Id.* § 32-7-5-15.
90. *Id.* § 32-7-5-12(c).
91. 643 N.E.2d 922 (Ind. Ct. App. 1994), *trans. denied.*
92. *Id.* at 924.
93. *Id.*
94. *Id.*
95. *Id.* at 924-25.

withhold a security deposit not only for the landlord's claim against the security deposit, but also for "other damages" to the rental unit.[96] Tenants contended that Landlord was not entitled to any "other damages exceeding the security deposit," other than actual damages not the result of ordinary wear and tear.[97] Landlord countered that the ordinary wear and tear limitation in the Security Deposits Statute applied only to claims made against the security deposit itself and not to other damages.[98]

Applying the Security Deposits Statute, the court observed that where a landlord has given written notice of damages to the tenant as required under the statute, the statute does not preclude the landlord from recovering other damages.[99] However, the statute provides that if a landlord has failed to give the required itemized written notice of damages to the tenant, then under section 15, no other damages were due.[100] Here, Landlord gave Tenants the requisite notice and thus, the court concluded that he could make a claim for other damages.[101]

Next, the court pointed out that the Tenants only challenged whether the Landlord was entitled to recover cleaning expenses he incurred as "other damages" under the lease.[102] The court noted that Landlord's claim for other damages was based on two provisions in the lease which required the tenants to clean certain appliances, wash and wax floors, shampoo rugs, and restore the premises to the same condition as when the Tenants took possession.[103] The court interpreted Tenants' argument to be that the Security Deposits Statute prohibited the parties from entering into a private agreement concerning the obligation to clean the leased premises because the legislature determined that the phrase "ordinary wear and tear" included the accumulation of dirt.[104] The Security Deposits Statute states that a security deposit may be used to reimburse the landlord for actual damages to the rental unit which are not the result of ordinary wear and tear.[105]

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96. *Id.* at 925.
97. *Id.*
98. *Id.*
99. *Id.* at 925-26 (citing IND. CODE § 32-7-5-12(c) (1993)).
100. *Id.* at 926 (citing IND. CODE § 32-7-5-15 (1993)).
101. *Id.*
102. *Id.* Tenants also claimed that the notice of cleaning and carpet replacement expenses in the written notice of damages was deficient because it contained only estimates of the costs and not actual receipts. Rejecting this contention in a footnote, the court indicated that the Security Deposits Statute only requires the landlord to advise the tenant of charges against the security deposit, not other damages. *Id.* at 926 n.6. Here, the entire security deposit was charged against unpaid rent. Furthermore, the court observed that even if the statute was interpreted to require the landlord to advise the tenant of the costs of other damages, the statute only requires the landlord to provide the "estimated costs of repairs," and not actual receipts with the notice. *Id.* (citing IND. CODE § 32-7-5-14 (1993)).
103. *Id.* at 924.
104. *Id.* at 926-27.
105. IND. CODE § 32-7-5-13(1) (1993).

Rejecting Tenants' position, the court determined that the statute was not intended to limit the freedom of contract by prohibiting the parties from contractually creating additional obligations under the lease beyond the protection of security deposits.[106] The court noted that the Security Deposits Statute unambiguously preserved to the landlord or tenant the right to recover other damages and the court stated: "[i]t was not the legislature's intent to limit the freedom of landlords and tenants to contractually define 'other damages,' including the obligation to clean the premises."[107] Therefore, the court rejected Tenants' contention that the Security Deposits Statute prohibited the parties from entering into a private agreement concerning the obligation to clean the leased premises.

Tenants then claimed that even if the Security Deposits Statute did not govern claims for other damages, the recovery for cleaning expenses was inconsistent with the "reasonable wear and tear" exclusion in the lease.[108] Again, the court disagreed. Although the phrase "ordinary wear and tear" had never been defined in Indiana, the court found authority in other jurisdictions which suggested that the term "refers to the gradual deterioration of the condition of an object which results from its appropriate use over time."[109] The court determined that the accumulation of dirt on objects was not the same as the gradual deterioration over time and that such objects are usually capable of being restored to their clean condition. The court opined that the accumulation of dirt was not ordinary wear and tear and that a rental unit, which tenants are required to clean under a lease but fail to do so, will be damaged by the accumulation of dirt.[110] Thus, the court concluded that Landlord could pursue a claim for cleaning expenses under the lease.[111]

Tenants further contended that Landlord's claim for damages was barred based upon Landlord's failure to comply with the Bloomington Housing Code ("Housing Code").[112] The Housing Code required that a joint written inspection be completed by the landlord both at the time of the tenants' initial occupancy and at the end of the lease term. The Housing Code also required that an inventory and damages list be completed and signed by the parties which would be considered part of the tenancy agreement.[113]

The court opined that all laws in force at the time of the lease, including municipal ordinances, impliedly became a part of the agreement and thus, the joint

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106. *Miller*, 643 N.E.2d at 926-27.

107. *Id.* at 927.

108. *Id.*

109. *Id.* (citing Publishers Bldg. Co. v. Miller, 172 P.2d 489, 496 (Wash. 1946); Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 936 (W.D. Pa. 1973); United States Gypsum Co. v. Schiavo Bros., 450 F. Supp. 1291, 1305 (E.D. Pa. 1978); Smolen v. Dahlmann Apartments, Ltd., 338 N.W.2d 892 (Mich. Ct. App. 1983)).

110. *Id.* at 928.

111. *Id.*

112. *Id.* (citing BLOOMINGTON, IND., MUNICIPAL CODE tit. 16, § 16.12.040 (1994)).

113. *Id.* at 928 n.10.

inspection requirement was incorporated into the terms of the lease at issue.[114] The facts presented indicated that Landlord had failed to perform a joint written inspection either at the inception of the lease or at the end of the term. However, Landlord argued that the lease agreement provided that the tenant, not the landlord, had the duty to document the condition of the rental unit at the inception of the lease and thus, Landlord was not obligated under the Housing Code.[115] The court disagreed and noted that the Housing Code specifically provided that any private agreement which attempted to exclude or modify the inspection procedures created by the Housing Code was void.[116] Nevertheless, while determining that the lease provision which attempted to shift the responsibility of the inspection to Tenants was unenforceable, the court concluded that Landlord's compliance with the inspection requirements of the Bloomington Housing Code was not a condition precedent to a suit against Tenants for damages.[117]

The court noted that while the Housing Code is incorporated into the lease by operation of law, the Housing Code provisions were to be construed like other provisions of the lease and the Housing Code could not dictate the legal effect of the landlord's failure to conduct an inspection.[118] Thus, the Housing Code did not and could not declare that Landlord's noncompliance with the inspection provision precluded the admission of evidence on his claim for damages to the rental unit.[119]

Instead, the court indicated that the inspection provisions were subject to the same common law defenses usually available for breach of contract such as "waiver, estoppel, subsequent written or oral modification, compromise, settlement, accord and satisfaction and impossibility of performance."[120] Here, Tenants "failed to assert their right to a joint inspection" at the inception of the lease, and Landlord relied on their acquiescence and implied consent to no inspection.[121] Moreover, Landlord supplied Tenants with a "Summary of Tenants' and Owners' Rights and Responsibilities" as required by the Code, which informed Tenants that if the owner did not initiate a joint inspection, Tenants should request one, and that Tenants could initiate their own inspection report and send a copy to the owner.[122]

In addition, the court pointed out that Tenants waived their right to a "move-out inspection." One of the tenants, Miller, contacted Landlord regarding the cleaning of the apartment, and Landlord informed her that he could hire someone

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114. *Id.* (citing Breezewood Management Co. v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980), *trans. denied*).

115. *Id.* at 929.

116. *Id.*

117. *Id.*

118. *Id.* at 929-30.

119. *Id.* at 930 (citing City of Bloomington v. Chuckney, 331 N.E.2d 780 (Ind. Ct. App. 1975), *trans. denied*; Breezewood Management Co. v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980), *trans. denied*).

120. *Id.*

121. *Id.*

122. *Id.*

to professionally clean the rental unit for "no more than three hundred dollars."[123] Miller contacted two of the other tenants who agreed in writing to allow Landlord to clean the rental unit and to deduct the cost from the security deposit.[124] Although the Housing Code required Landlord to document the condition of the premises at the beginning and at the end of Tenants' occupancy, Tenants decided to forego the joint written inspection and agreed to Landlord's estimate of damages. Thus, the court concluded that Tenants were estopped from repudiating the agreement regarding the cleaning of the rental unit or from objecting to the lack of a joint inspection. Accordingly, the court affirmed the trial court's judgment in Landlord's favor.[125]

3. Surrender and Acceptance As Triggering Statutory Notice of Damages Period.—In *Mileusnich v. Novogroder Co.*,[126] Mileusnich leased an apartment from Novogroder Co. ("Novogroder") for a term of one year from July 29, 1993, through July 31, 1994. Mileusnich gave Novogroder a $525.00 security deposit at the time he signed the lease. On August 7, 1993, Mileusnich attempted to take possession, but was told that the apartment was not yet completed. On August 11, 1993, after being informed that the unit would not be ready for another three days, he requested a return of his security deposit and tore up the lease.[127] Novogroder ignored Mileusnich's requests for the return of the security deposit and relet the apartment in mid-September 1993. Mileusnich filed a complaint against Novogroder seeking the return of his security deposit and attorney fees. The trial court denied relief and Mileusnich appealed.[128]

On appeal, Novogroder argued[129] that the action was premature because the rental agreement did not terminate until July 31, 1994, and that a landlord had forty-five days after termination of the rental agreement to return the security deposit.[130] Rejecting this argument, the court determined that a surrender and acceptance had occurred by operation of law in that:

> A surrender will arise by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant

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123. *Id.* at 930-31.

124. *Id.* at 931.

125. *Id.*

126. 643 N.E.2d 937 (Ind. Ct. App. 1994).

127. *Id.* at 939.

128. *Id.*

129. In his reply brief, Mileusnich argued that Novogroder's failure to deliver possession of the premises on August 11, 1993 constituted a breach of the implied covenant of possession. *See* Taylor v. Phelan, 69 N.E.2d 145, 150 (Ind. Ct. App. 1946) (Indiana follows the English rule which provides that in the absence of an express provision in the lease, the lessor impliedly covenants that the premises will be both legally and actually open for the occupancy of the tenant on first day of the lease term). However, because Mileusnich failed to raise this argument during trial or in his appellate brief, the court determined that the issue was waived. *Mileusnich*, 643 N.E.2d at 940 n.3.

130. *See* IND. CODE § 32-7-5-15 (1993).

as to imply they have both agreed to consider the surrender as effectual.[131]

The court explained that for a surrender to occur there must be more than a mere yielding of the premises by the tenant. "There must be some decisive, unequivocal act by the landlord which manifests the lessor's acceptance of the surrender."[132] The court found that Mileusnich offered to surrender the premises when he tore up the lease and that Novogroder accepted the surrender when it relet the apartment in mid-September.[133] Thus, the court concluded that the lease was terminated and the forty-five day notice of damage period was triggered.[134]

Importantly, the court noted the longstanding rule that surrender and acceptance must be determined on a case-by-case basis by examining the acts of the respective parties.[135] In *Grueninger Travel Service v. Lake County Trust Co.*, the court determined that the acceptance of the keys by the landlord and the subsequent reletting of the premises to a third party did not constitute an acceptance of surrender by the landlord.[136] Similarly, in *Hirsch v. Merchants National Bank & Trust Co.*,[137] the court found that where a landlord relet the premises to fulfill its obligation to mitigate damages, the landlord's actions did not constitute an acceptance of surrender.[138] The mere reletting of the premises may not constitute an acceptance of a tenant's surrender and the *Mileusnich* court stressed that such a determination must be made on a case-by-case basis founded upon the facts before the court.

After determining when the lease was terminated, the court next addressed whether Novogroder complied with the Security Deposits Statute. The court determined that because Novogroder had not provided Mileusnich with a written itemized list of damages within forty-five days of termination of the lease as required by the sections 12 and 14 of the Security Deposits Statute, the failure to comply with the statute constituted an agreement by Novogroder that no damages were due.[139] Thus, the court concluded that Mileusnich was entitled to the return of his full security deposit plus reasonable attorney fees.[140]

4. Abandonment by Tenant As Triggering Statutory Notice of Damages Period.—In *Figg v. Bryan Rental Inc.*,[141] the tenant, Gary Figg ("Figg") entered into an agreement to lease an apartment from Bryan Rental Inc. ("Bryan Rental")

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131. *Mileusnich*, 643 N.E.2d at 939 (citing Grueninger Travel Serv. v. Lake County Trust Co., 413 N.E.2d 1034, 1038 (Ind. Ct. App. 1980)).

132. *Id.* (citing *Grueninger*, 413 N.E.2d at 1039).

133. *Id.* at 940.

134. *Id.* at 940-41.

135. *Id.* at n.2 & n.4 (citing *Grueninger*, 413 N.E.2d at 1039).

136. *Grueninger*, 413 N.E.2d at 1039.

137. 336 N.E.2d 833 (Ind. Ct. App. 1975).

138. *Id.*

139. *Mileusnich*, 643 N.E.2d at 940-41 (citing Chasteen v. Smith, 625 N.E.2d 501, 502 (Ind. Ct. App. 1993)). *See also* IND. CODE § 32-7-5-12 (1993).

140. *Mileusnich*, 643 N.E.2d at 941.

141. 646 N.E.2d 69 (Ind. Ct. App. 1995), *trans. denied.*

for a one-year term ending August 14, 1992. The monthly rent was $325.00 and Figg paid a security deposit of $295.00. Figg's attorney notified Bryan Rental on March 27, 1992 that Figg had vacated the apartment and returned the front door and mailbox keys.[142] Bryan Rental then brought an action against Figg for unpaid rent for the remainder of the lease term, damages, and attorney fees. The trial court granted Bryan Rental's motion for summary judgment and entered judgment in the amount of $1,005.00 itemized as four months rent less the security deposit.[143] Figg appealed.

The first issue Figg raised on appeal was the timeliness of Bryan Rental's itemized written notice of damages. Sections 12 and 14 of the Security Deposits Statute required that notice be given to the tenant within forty-five days after termination of the rental agreement and delivery of possession.[144] Figg contended that the forty-five day notice period should have begun on March 27, 1992 when his attorney notified Bryan Rental that Figg had vacated the premises.[145]

The court noted that both sections 14 and 15 of the Security Deposits Statute require that notice of damages must be given to the tenant within forty-five days after termination of occupancy.[146] However, section 12(a) of the statute states that the forty-five day notice period begins to run upon the "termination of the rental agreement and delivery of possession" and section 16 provides that the forty-five day notice period begins upon "termination of the tenancy."[147] Thus, the statute does not identify with certainty the event that will trigger the forty-five day period.

Addressing these different termination requirements, the court pointed out that if the forty-five day notice period began upon termination of occupancy, such an interpretation would lead to a result unintended by the legislature because the tenant could trigger the forty-five day notice period by unilaterally ending his occupancy of the rental unit by abandonment.[148] The tenant then could successfully escape all liability for future rent unless the landlord sends the statutory notice of damages to the tenant within forty-five days of abandonment even though the landlord did not treat the abandonment as a termination of the obligations under the lease agreement.[149] Thus, the court held that where a tenant abandons the premises and the lease agreement terminates at a later date, it is the termination of the lease agreement that triggers the forty-five day notice provision.[150]

Having reached this conclusion, the court then examined whether the tenant's offer of surrender was accepted by the landlord. Citing *Mileusnich v. Novogroder*

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142. *Id.* at 70.

143. *Id.*

144. IND. CODE §§ 32-7-5-12, -14 (1993).

145. *Figg*, 646 N.E.2d at 72.

146. *Id.*

147. *Id.* at 72 n.5 (quoting IND. CODE §§ 32-7-5-12(a), -16 (1993)). *See also* Walter Krieger, *1992 Developments in Indiana Property Law*, 26 IND. L. REV. 1113, 1117 (1993).

148. *Figg*, 646 N.E.2d. at 72.

149. *Id.*

150. *Id.*

Co.,[151] the court noted that there must be some decisive unequivocal act by the landlord that manifests the landlord's's acceptance of the surrender.[152] When Figg's attorney informed Bryan Rental that Figg's abandonment of the premises was permanent on March 30, 1992, Bryan Rental's president, David Kamen, telephoned Figg and asked him to continue the lease agreement and Figg agreed to continue the rental payments until a subtenant could be found. However, on May 22, 1992, Figg's attorney informed Bryan Rental that Figg was no longer liable for the rent and on May 26, 1992, Bryan Rental sent Figg a written accounting of his security deposit. Based upon these facts, the court concluded that Bryan Rental accepted the surrender on May 26, 1992, when it responded to the demand letter from Figg's attorney.[153] Therefore, the court determined that Bryan Rental's damages letter was timely under the Security Deposits Statute and that the trial court did not err in granting Bryan Rental's summary judgment motion and denying Figg's motion.[154]

Figg further contended that even if the notice of damages letter was timely, it failed to itemize the damages as required by sections 12 and 14 of the Security Deposits Statute.[155] The court disagreed. The court pointed out that when the damage notice was sent on May 26, 1992, two months rent was due under the lease, an amount which exceeded the amount of the security deposit.[156] Under section 13 of the Security Deposits Statute,[157] unpaid rent is one of the enumerated obligations that the landlord may charge against the security deposit. The letter indicated that the rent had not been paid since March and that the security deposit would be applied towards the unpaid rent. The court noted that this was adequate to inform the tenant that the landlord was keeping the security deposit and the purpose for which it was being applied.[158]

In reaching this conclusion, the court distinguished *Duchon v. Ross*,[159] where the Indiana Court of Appeals found the notice inadequate because it did not contain an estimated cost of repairs. In *Duchon*, the letter informed the tenant that the landlord was keeping the security deposit for damages but did not indicate the cost of repairs.[160] However, in the present case, Figg was made aware that Bryan Rental was keeping his security deposit for unpaid rent and this provided Figg with an opportunity to challenge the costs for which the deposit was being used.[161] Accordingly, the court affirmed the trial court's grant of summary judgment in

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151. 643 N.E.2d 937, 939 (Ind. Ct. App. 1994).
152. *Figg*, 646 N.E.2d at 73.
153. *Id.* at 74.
154. *Id.*
155. IND. CODE §§ 32-7-5-12, -14 (1993).
156. *Figg*, 646 N.E.2d at 75.
157. IND. CODE § 32-7-5-13 (1993).
158. *Figg*, 646 N.E.2d at 75.
159. 599 N.E.2d 621 (Ind. Ct. App. 1992).
160. *Id.* at 624.
161. *Figg*, 646 N.E.2d at 75.

Bryan Rental's favor.[162]

III. Real Estate Broker

A. Fraudulent Misrepresentation

In *Dawson v. Hummer*,[163] Marvin and Katherine Hummer, a married couple, contacted Steven Dawson, a real estate agent employed by Francis Real Estate, to assist them in finding a house. They explained to Dawson that "they were looking for a four bedroom home with a useable basement in the $45,000.00 to $50,000.00 range," and that they were interested in using Marvin's eligibility for a VA loan.[164] Both Katherine and Marvin are high school graduates. Marvin, age 32, had never purchased a house prior to this time, although Katherine, age 30, had purchased a house through FHA during her first marriage.

With Dawson's help, the Hummers made an offer on a house. When the offer was accepted, Dawson told them that the VA "would come through the house and look for things."[165] The Hummers, on Dawson's advice, then filled out the necessary paperwork to obtain a VA loan. Dawson then informed them that the garage window sills had to be scraped and painted before the closing could take place. Katherine assumed that it was the VA who had informed Dawson about the window sills because Dawson had informed them that the VA had approved the loan. The Hummers, apparently with Dawson's assistance, scraped and painted the window sills. However, the day before closing, a pest inspection revealed water damage to the joists. The owner of the house refused to repair the damage, and the deal fell through. The Hummers had not ordered the inspection, but Katherine assumed that this was automatically done when one purchases a house.[166]

A short time later, Dawson located another house fitting the Hummers needs and the Hummers, accompanied by Dawson, "toured" the house. During the tour, Katherine noticed that the basement walls were bowed, and that "[u]pon one wall were affixed metal plates from which metal rods protruded."[167] When questioned about the bowed walls and the anchor system, "Dawson told the Hummers that the anchored wall had been fixed and that the other walls were fine."[168] Katherine then asked Dawson if the basement was usable for her eldest son to sleep "down there."[169] Dawson said yes and told them that "the VA would do inspections of the house."[170]

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162. *Id.*
163. 649 N.E.2d 653 (Ind. Ct. App. 1995).
164. *Id.* at 657.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

Marvin testified that because the first house had been inspected to reveal the floor joist damage, he assumed that the VA would inspect the second house before closing. Dawson informed the Hummers that an additional inspection would cost $175. The Hummers could not afford the additional expense and signed a waiver of additional inspection.[171]

Shortly before the closing, a personal friend of the Hummers, who was also a real estate broker, advised the Hummers not to purchase the house because the bowed basement walls had not passed an earlier FHA inspection. Katherine relayed this information to Alice Francis, owner of Francis Real Estate, but Francis assured her one wall had been repaired and the others were fine.[172]

After the sale was closed and the Hummers took possession of the house, significant problems developed in the basement, and condemnation was recommended by a private contractor.[173] The Hummers sued Dawson, Alice Francis and Francis Realty (collectively "Dawson"), alleging fraudulent misrepresentation and constructive fraud. Dawson filed a motion for summary judgment, which was denied. The case proceeded to a jury trial, after which the jury returned a verdict for the Hummers and awarded damages in the amount of $18,000.[174] Dawson appealed.

Dawson first challenged the denial of his motion for summary judgment, arguing that the undisputed facts did not support the Hummers claim for fraud.[175] Specifically, Dawson argued that the Hummers' reliance on Dawson's representations was unreasonable in light of the Hummers' actual knowledge of the bowed basement walls. The Indiana Court of Appeals disagreed, concluding that in light of the representations made by Dawson and the Hummers' inexperience in real estate transactions, the reasonableness of the Hummers' reliance was a question of fact for the jury.[176]

Dawson also argued that summary judgment should have been granted based on the express waiver of inspection and release of liability in the purchase agreement. The court again disagreed reasoning that although Indiana law recognizes exculpatory clauses, such clauses are only enforceable if they are "'knowingly and willingly made and free from fraud.'"[177] Because a factual issue existed regarding whether Dawson committed fraud, summary judgment was

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171. *Id.* at 658.

172. *Id.* at 659.

173. *Id.*

174. *Id.*

175. In order to prevail on their fraud theory, the Hummers had to demonstrate: 1) a material representation of past or existing fact; 2) that was false; 3) that was made with knowledge or with reckless disregard of its falsity; 4) that was relied upon by the Hummers; and 5) that proximately caused the Hummers' injury. *Id.* (citing Showalter, Inc. v. Smith, 629 N.E.2d 272, 274 (Ind. Ct. App. 1994), *trans. denied*).

176. *Id.*

177. *Id.* (quoting General Bargain Ctr. v. American Alarm Co., 430 N.E.2d 407, 411 (Ind. Ct. App. 1983)).

properly denied.[178]

Finally, Dawson argued that summary judgment should have been entered on the Hummers' constructive fraud claim. Constructive fraud "arises by operation of law when there is a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud."[179] In order to succeed on a constructive fraud claim, the Hummers needed to show that Dawson owed them a duty by virtue of the parties' relationship.[180]

Dawson argued that the Hummers could not prove the existence of this duty because the purchase agreement expressly indicated that Dawson was an agent of the seller. In addressing this argument, the court recognized that "constructive fraud may be found where one party takes unconscionable advantage of his dominant position in a confidential or fiduciary relationship."[181] Given the Hummers' inexperience and their continued reliance on Dawson's assistance in the resolution of their home-buying problems, conflicting inferences existed regarding whether Dawson and the Hummers had a confidential relationship. Accordingly, summary judgment on the constructive fraud claim was properly denied.[182] The judgment was affirmed.

B. Commissions

In *Otto v. Pelis*,[183] Jeffery Pelis ("Pelis") worked as an associated real estate broker-salesperson under the umbrella of John Otto's ("Otto") license as a principal broker. Pursuant to this arrangement, Otto and Pelis orally agreed that Pelis would receive sixty percent of any commission payable to Otto based upon the sale of real estate.[184]

On May 21, 1992, Pelis procured a listing for a piece of residential property in Allen County. By August 1991, Pelis had obtained an agreement with a prospective purchaser of the property. On September 25, 1991, Pelis and Otto terminated their business relationship. Otto completed the transaction with the Allen County property and closed the transaction on February 2, 1992, receiving a commission of $1,661.10 for the sale.[185] In May 1993, Pelis brought suit against Otto seeking his portion of the commission for the Allen County property. Otto counterclaimed and alleged that as of September 25, 1991, Pelis had been an independent contractor, his license had been returned, and all his listings had been forfeited.[186] Following a trial, the trial court entered judgment against Otto and

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178. *Id.*

179. *Id.* at 661 (citing Biberstine v. New York Blower Co., 625 N.E.2d 1308, 1315 (Ind. Ct. App. 1993)).

180. *Id.*

181. *Id.*

182. *Id.*

183. 640 N.E.2d 712 (Ind. Ct. App. 1994).

184. *Id.* at 713.

185. *Id.*

186. *Id.*

awarded Pelis $996.66 plus costs.[187] Otto appealed.

The issue presented to the Indiana Court of Appeals was whether Pelis was entitled to damages based upon his oral agreement with Otto. Otto contended that when his association with Pelis terminated in September 1991, Pelis turned over all of his listings with Otto and lost his interest in the Allen County property. Therefore, Pelis could not collect sixty percent of the commission.[188]

In support, Otto directed the court's attention to title 876 of the Indiana Administrative Code, which states that any licensee who terminates his association with a principal broker will turn over any and all listings obtained during the association.[189] The court agreed that under the regulation, Pelis was required to turn over his listings to Otto. However, the court determined that the regulation did not preclude Pelis from recovering, under his oral contract with Otto, his percentage of the commission from the Allen County property.[190] The court pointed out that section 19 applied to property rights in the listings; it did not inhibit recovery pursuant to an oral contract for Pelis' past performance.[191]

The court next addressed Otto's contention that Pelis lacked standing as a real party in interest pursuant to Indiana Trial Rule 17.[192] Otto claimed that because Pelis had terminated his association with Otto, Pelis was no longer licensed to sell real estate and therefore could not, as a matter of law, participate in the conveyance of the Allen County property in any brokerage capacity. Again, the court disagreed. The court noted that Pelis was requesting his percentage of the commission pursuant to his oral agreement with Otto. As one of the parties to the oral contract, the court determined that Pelis was a real party in interest.[193]

Otto also claimed that Pelis' termination prior to the actual sale of the property divested Pelis of any interest in recovery pursuant to the oral agreement. The court rejected this argument, pointing out that Otto mistook Pelis' claim against him with situations where an "unlicensed real estate agent asserts that he is entitled to a commission from the owner of the property."[194] The court pointed out that although Pelis' license was returned to the Indiana Real Estate Commission when his association with Otto terminated, Pelis was a licensed salesperson at the time he procured the listing and obtained the buyer's agreement to purchase the property at issue. Thus, the court concluded the Pelis was entitled to recover the

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187. *Id.*

188. *Id.* at 714.

189. IND. ADMIN. CODE tit. 876, r. 19 (1992).

190. *Otto*, 640 N.E.2d at 714.

191. *Id.*

192. Indiana Trial Rule 17 provides that every action shall be prosecuted by a real party in interest. To acquire a real party in interest status, "a person must have a present and substantial interest in the relief being sought"; in essence, "the plaintiff must be entitled to the fruits of the action." Brenner v. Powers, 584 N.E.2d 569, 573 (Ind. Ct. App. 1992), *trans. denied.*

193. *Otto*, 640 N.E.2d at 714.

194. *Id.* To illustrate these situations, the court cited Voelkel v. Berry, 218 N.E.2d 924 (Ind. Ct. App. 1966); McKenna v. Turpin, 151 N.E.2d 303 (Ind. Ct. App. 1958); and Folsom v. Callen, 131 N.E.2d 328 (Ind. Ct. App. 1956).

amount pursuant to the oral agreement.[195]

Finally, Otto contended that the oral agreement violated the statute of frauds in that a writing was required for a conveyance in real estate or, alternatively, an obligation to pay the debt of another.[196] The court rejected both claims.[197] First, the court noted that the statute of frauds provides that "no recovery can be had for services rendered in the sale of real estate unless a contract in writing promising to pay for such services has been executed by the owner or his duly authorized personal [sic]."[198] Here, the contract was between Otto and Pelis, not Pelis and the owner of the Allen County property. Thus, this part of the statute of frauds was not applicable.[199] Second, the court noted that the contract between Pelis and Otto did not involve the promise to pay the debt of another and that Pelis had not alleged the owner of the property was responsible for the debt. Again, the court concluded that the statute of frauds was not applicable.[200] As a result, the court affirmed the judgment of the trial court.

IV. SERVITUDES: EASEMENTS AND COVENANTS

A. Easements

1. Scope.—Two opinions decided by the Indiana Court of Appeals during the past year involved the rights of the dominant tenant under an easement appurtenant. The first case, *Metcalf v. Houk*,[201] addressed whether the granting of an easement to non-lakefront lot owners for access to the lake includes the right of the easement holders to build a pier at the lake end of the easement. The second case, *Wendy's of Fort Wayne, Inc. v. Fagan*,[202] involved the right of the dominant tenant to install utilities in a right-of-way easement.

Metcalf involved a dispute between landowners in a lakefront subdivision. When the subdivision was built, its developers constructed a roadway over a lot extending to the lakefront shoreline and granted a nonexclusive right to lot owners whose lots did not border the lake to use the easement for ingress and egress "to the water's edge."[203] The servient lot was subsequently sold to the plaintiff Houk. The defendants, Metcalf and Keck, owners of lots that did not border the lake, exercised their presumed rights to use the easement by occasionally parking their cars on a paved portion of the roadway, attaching a moveable pier to a seawall located on Houk's property, and mooring their boats to the pier.[204]

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195. *Otto*, 640 N.E.2d at 715.
196. *Id.* (citing IND. CODE § 32-2-1-1 (1993)).
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. 644 N.E.2d 597 (Ind. Ct. App. 1994).
202. 644 N.E.2d 159 (Ind. Ct. App. 1994).
203. *Metcalf*, 644 N.E.2d at 599.
204. *Id.*

Houk requested that Metcalf and Keck remove the pier and stop parking their cars on the roadway. When they refused, Houk filed this action. The issue presented to the trial court was whether the conveyance of the easement appurtenant expressly granting "ingress and egress" over Houk's property "to the water's edge" contemplated the right of the easement holders to build, maintain and use a pier on the servient parcel. The trial court concluded that it did not and permanently enjoined the easement holders from doing so. The easement holders appealed.

On appeal, the court noted that while generally the granting of "an easement for ingress and egress confers only the right to pass over the land and not to control the real estate or install improvements," in the case of an easement for access to a lake, the dominant owner "may gain the right to erect and maintain piers, moor boats and the like, where express language in the instrument creating the easement so provides."[205] The court further noted that when construing easements involving access to a body of water in which the instrument is silent regarding the specific rights of the easement holder, "the trial court may allow extrinsic or parol evidence to ascertain the intent of the parties who created the easement."[206] In reaching this conclusion, the court relied heavily on the following language from *Klotz v. Horn*:[207] "generally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been."[208]

In the instant case, subdivision developer Leslie Willig testified that the grantors of the easement intended to allow the owners of landlocked lots to use the easement in such a manner "that they could have essentially the same rights as they would have if they had lakefront property, except that they would have to share it."[209] Willig understood those rights to include the use of vehicular traffic and the installation and maintenance of a pier.[210]

In rejecting the right of the defendants to construct the pier at the lake end of the easement, the trial court noted that where a nonexclusive easement is held jointly with others, none of the dominant tenants has a right to "exclusively control a portion of the easement" or to "usurp for [their] own benefit that which is held in common with others."[211] While agreeing with this general statement, the court of appeals observed that the defendants had not claimed exclusive use of the pier, and in fact had allowed others to dock their boats at the pier.[212] The court observed that the owner of an easement, including the owner of a non-exclusive easement, has the right to make alterations and improvements reasonably

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205. *Id.* (citing Klotz v. Horn, 558 N.E.2d 1096, 1097-98 (Ind. 1990)).
206. *Id.*
207. 558 N.E.2d 1096 (Ind. 1990).
208. *Id.* at 1098.
209. *Metcalf*, 644 N.E.2d at 600.
210. *Id.*
211. *Id.* at 600-01.
212. *Id.* at 601.

necessary to make the grant effectual, provided that where the easement is held in common with others, the owner "may not alter or use the land in such a manner as to render the easement appreciably less convenient and useful for other co-owners."[213]

Applying these principles, the court concluded that "the easement was intended only to grant those uses which make the grant of the easement effectual."[214] Because such was not necessary to effectuate the grant, the easement at issue did not allow the storage of equipment and parking of vehicles thereon, except as necessary for loading and unloading passengers and equipment. However, in order to use and enjoy the easement, it must be interpreted as allowing the easement holders to install and maintain a pier or dock, provided that the use of the pier was nonexclusive and did not interfere with the shared rights of other easement holders and the owner of the servient lot. Accordingly, the injunction was affirmed as to parking of motor vehicles and storage of personal property, and reversed as to installation of the pier.[215]

In *Wendy's of Fort Wayne, Inc. v. Fagan*,[216] Fagan owned a triangular shaped tract of land bounded on the southern and eastern sides by property owned by Wendy's of Fort Wayne, Inc. The western side of Fagan's land was the south-right-of-way of U.S. Highway 24. There was no means of entry to the Fagan tract from the limited access highway. In order to obtain approval of its plan to develop a restaurant on its property, the Allen County Plan Commission required Wendy's to grant Fagan an easement across its property to provide him access from his property to Liberty Mills Road, which lies to the south of Wendy's property. The easement provided for a nonexclusive right of way for purposes of ingress and egress to and from the Fagan property.

Thereafter, Fagan attempted to obtain Wendy's permission to install gas, water, electric and phone utilities in the easement. He also requested permission to install a 52-inch electrified sign in the unpaved portion of the easement near the Liberty Mills Road intersection, in order to direct customers and suppliers to the automotive service center which Fagan was constructing on his property. When he was unsuccessful, Fagan filed a declaratory judgment suit, and the trial court ruled that Fagan had a right to install the utilities and the sign within the easement. Wendy's appealed.

On appeal, the court first addressed the issue of whether the grant of the easement gave Fagan an unlimited right to install utilities in the easement. The court found that it did not, and distinguished *New York Central Railroad Co. v. Yarian*.[217] The court distinguished *Yarian* because that case involved a broad

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213. *Id.* (citing Board of Comm'rs v. Joeckel, 407 N.E.2d 274, 277 (Ind. Ct. App. 1980); Litzelswope v. Mitchell, 451 N.E.2d 366, 369-70 (Ind. Ct. App. 1983)).

214. *Id.*

215. *Id.*

216. 644 N.E.2d 159 (Ind. Ct. App. 1994).

217. 39 N.E.2d 604 (Ind. 1942). In *Yarian*, the Indiana Supreme Court held that the reservation of two farm crossing easements for access to two divided portions of the farm resulting from the sale of the servient estate was sufficiently broad to permit the installation of underground

grant of easement, whereas the easement in *Fagan* was "limited by the ingress and egress language."[218] Here, the installation of utilities was not necessary to effectuate the purpose of the grant, which was to provide Fagan with direct access to a public road. Moreover, the court noted that, unlike the *Yarian* grant, which was made in 1871, the grant at issue was made in 1993, "a time when electricity, gas, water, and phones were not just contemplated but considered necessary."[219] Thus, the grantor's failure to specifically provide for the installation of utilities indicated that Fagan's use of the easement was limited to ingress and egress.[220]

With regard to Fagan's right to install the 52-inch electrified sign, the court found that this right was necessary to effectuate the grant of ingress and egress to Fagan's business, which was located 261 feet from Liberty Mills Road, the only public street leading to Fagan's property.[221] Without a sign, employees, customers and suppliers might not be able to locate the entrance to Fagan's business and the easement would be rendered virtually worthless. In addition, the court concluded that Fagan had a limited right to install electricity lines "for the sole purpose of illuminating the sign."[222] Thus, the decision of the trial court was reversed with regard to the construction of utility and power lines and affirmed with regard to the installation of the illuminated sign.[223]

2. *Easements: Abandoned Railroad Property.*—In *Huff v. Langman*,[224] the Indiana Court of Appeals addressed the issue of ownership of an abandoned railroad right-of-way. The facts revealed that the Huffs purchased several acres of land, a portion of which was an abandoned railroad right-of-way, and received a quitclaim deed. Thereafter, the Huffs made numerous improvements on the land. The Langmans, owners of the adjoining land, filed a complaint to quiet title to the eastern half of the Huffs' land, which was the abandoned railroad right-of-way. The trial court granted the Langmans' motion for summary judgment, concluding that as a matter of law, the former right-of-way portion of the Huffs' land had reverted to the Langmans upon abandonment.[225] The Huffs appealed.

The Huffs did not challenge the trial court's finding that the land at issue was an abandoned railroad right-of-way subject to reversion.[226] Instead, the Huffs

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water pipes and a conduit for the purpose of supplying electricity. *Id.* at 607.

218. *Fagan*, 644 N.E.2d at 162 (citing Hagemeier v. Indiana & Michigan Elec. Co., 457 N.E.2d 590 (Ind. Ct. App. 1983) (ingress and egress involves the right to pass over another's land rather than a more extensive right to alter or partially control the land)).

219. *Id.* at 163.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. 646 N.E.2d 730 (Ind. Ct. App. 1995).

225. *Id.* at 731.

226. The court of appeals recognized the rule that

> when a landowner conveys some interest in land to a railroad, and in so doing limits use of that land 'for railroad purposes only,' the landowner conveys an easement to the railroad. The easement terminates upon abandonment by the railroad, at which time fee

argued that the Langmans' status as adjoining landowners was in dispute, making summary judgment inappropriate. The court of appeals disagreed. Although at one time the Langmans' property was a railroad right-of-way, the land was subsequently conveyed in a series of transactions involving the issuance of tax deeds.[227] By statute, a properly executed tax deed vests fee simple absolute ownership in the grantee.[228] Accordingly, the prior owners of the land, whose ownership was evidenced by a tax deed, necessarily held the property in fee simple.[229] It followed that when the land was transferred to the Langmans, the Langmans received fee simple title thereto. The Langmans were therefore the lawful owners of the property adjacent to the abandoned railroad right-of-way, and thus the proper recipients of the reversionary interest. The court concluded that the Langmans' summary judgment motion was appropriately granted.[230]

However, despite this result, it is important to note that the improvements made by the Huffs to the land at issue did not go to the Langmans without compensation. The trial court expressly ordered that the Huffs were entitled to the protections provided in the Occupying Claimant Act.[231]

Two cases involving identical parties and arising out of one disputed railroad easement were also decided by the court of appeals in 1995.[232] The most recent case was *Calumet National Bank v. American Telephone & Telegraph Co. (Calumet II).*[233] In *Calumet II*, Calumet National Bank as Trustee under Trust No. P-3362 ("the Trust") instituted a trespass action against AT&T and its subsidiaries (collectively "the Utilities"). The trespass action arose out of the Utilities' installation of a fiber optic cable over an abandoned railroad easement that adjoined property owned by the Trust. Conrail, the previous owner of the railroad right-of-way, had granted a license to the Utilities permitting installation of the fiber optic cable. The Trust argued that the license was invalid, and that as a result, the Utilities' installation of the cable constituted a trespass. The trial court determined that the Utilities' license was valid and granted their motion for

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simple interest in the land reverts to the adjoining landowners.

Id. at 732 n.1 (quoting Richard S. Brunt Trust v. Plantz, 458 N.E.2d 251, 253, 256 (Ind. Ct. App. 1983)).

227. *Id.* at 732.

228. *Id.* (citing IND. CODE § 6-1.1-25-4(d) (Supp. 1994)).

229. *Id.*

230. *Id.*

231. *Id.* at n.4. The Occupying Claimant Act appears at IND. CODE §§ 34-1-49-1 to -12 (1993).

232. In Calumet National Bank v. American Telephone & Telegraph Co., 647 N.E.2d 689 (Ind. Ct. App. 1995), *trans. denied*, the issues centered around whether AT&T and its subsidiaries properly utilized Indiana's eminent domain procedures in condemning the former railroad easement at issue. Although noteworthy, this case involved the construction of Indiana's condemnation statutes. A full discussion of these statutes is not particularly relevant to the issue of abandonment of railroad easements. For purposes of clarity, however, this case will be referred to as *Calumet I*.

233. 654 N.E.2d 816 (Ind. Ct. App. 1995).

summary judgment.[234] The Trust appealed.

The disposition of this case centered around whether the Trust obtained fee simple title to Conrail's former right-of-way *prior to* the time that Conrail and the Utilities entered into the license agreement. The Trust argued that by operation of sections 8-4-35-4 and 8-4-35-5 of the Indiana Code,[235] Conrail had abandoned the easement prior to the execution of the license. Therefore, the Utilities' license was invalid, and the installation of the cable constituted a trespass.[236]

On the contrary, the Utilities argued that by operation of sections 8-4-35-6, 8-4-35-7 and 8-4-35-8 of the Indiana Code,[237] Conrail and the Utilities had entered into the license agreement prior to the Trust obtaining record title to the abandoned railroad easement.[238] After examining the statute as a whole and construing its provisions together, the court of appeals concluded that the Utilities' license was valid.[239] Because the Utilities entered the land under authority of a valid license, the trial court was correct in granting summary judgment in favor of the Utilities on the Trust's trespass claim.[240]

Calumet II is of marginal importance in light of the fact that in its 1995 session, the Indiana General Assembly repealed sections 8-4-35-1 through 8-4-35-11 of the Indiana Code.[241] The ownership of abandoned railroad rights-of-way is now governed by sections 32-5-12-1 through 32-5-12-15 of the Indiana Code.[242] This new chapter of the Indiana Code became effective on May 10, 1995.

B. Real Covenants and Equitable Servitudes

In *Noblesville Redevelopment Commission v. Noblesville Associates Limited Partnership*,[243] the Noblesville Redevelopment Commission ("the Commission") and the Noblesville Redevelopment Authority ("NRA") instituted a project to finance the acquisition and redevelopment of certain property, called the "allocation area," which incorporated the construction of an extension of Logan Street through Noblesville, Indiana.[244] The NRA financed the acquisition and redevelopment of the property from the proceeds of the sale of bonds. The bonds were to be repaid from lease payments by the Commission, who in turn was to make its lease payments from taxes on the real estate and from the sale or lease of property in the allocation area.[245]

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234. *Id.* at 818.
235. IND. CODE §§ 8-4-35-4, -5 (1993).
236. *Calumet II*, 654 N.E.2d at 819.
237. IND. CODE §§ 8-4-35-6 to -8 (1993).
238. *Calumet II*, 654 N.E.2d at 819-20.
239. *Id.* at 820.
240. *Id.*
241. IND. CODE §§ 8-4-35-1 to -11 (1993).
242. IND. CODE §§ 32-5-12-1 to -15 (Supp. 1995).
243. 646 N.E.2d 364 (Ind. Ct. App. 1995), *trans. denied.*
244. *Id.* at 367.
245. *Id.*

Noblesville Associates Limited Partnership, its general partner, and two other individuals ("the Guarantors") agreed to secure the Commission's lease payments in consideration for the NRA's issuance of the bonds.[246] Under the terms of the guaranty agreement, if the tax increments generated from certain real estate in Schedule C of the agreement failed to equal $93,500 in 1992, the Guarantors promised to make a supplemental payment to the Commission in the amount of the deficiency.[247]

No tax increments were generated in 1992, and despite a written demand by the Commission, the Guarantors failed to tender a supplemental payment. As a result, the Commission brought this action against NDC to foreclose a lien on the property. NDC made a motion for judgment on the pleadings, contending that the agreement did not create a lien on the property. The trial court agreed and entered judgment for NDC.[248] The Commission appealed.

In its motion to correct error, the Commission conceded that the guaranty agreement did not create a lien on the property. On appeal, the Commission argued that despite this fact, the agreement was in substance a covenant running with the land which entitled it to equitable relief.

The court's analysis of the covenant at issue first involved determining whether the covenant at issue ran with the land. An affirmative covenant will run with the land if it was the intent of the parties that it should run, "the covenant touches and concerns the land, and there is privity of estate."[249]

The court applied each of these criteria to the agreement in question. First, the court determined that the contract at issue unambiguously revealed the parties' objective intent to be bound and to render the debt enforceable against remote grantees. This was true despite the fact that NDC did not meet the legal definition of "successor in interest," and was in fact a remote grantee of the original covenantor.[250] In reaching this conclusion, the court relied upon the proposition that "the language of a real covenant must be read in an ordinary or popular sense and not in a legal or technical sense, since the goal of contract interpretation is to effectuate the parties' intent."[251] Because no particular language is required to demonstrate intent to run with the land, the court could rely on the plain language of the guaranty agreement to make this determination.[252]

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246. *Id.*

247. The relationship of the Guarantors to the realty upon which enforcement of the lien was sought was not contained in the guaranty agreement or the complaint, nor was it ever determined by the court. In fact, the opinion assumed that no privity of estate existed. Noblesville Development Company was the fee simple owner of the real estate, and Merchants Bank of St. Louis held a mortgage on the property dated July 9, 1991 (Noblesville Development Company and Merchants Bank are referred to collectively as NDC).

248. *Noblesville Redevelopment Commission*, 646 N.E.2d at 366.

249. *Id.* at 368 (quoting Moseley v. Bishop, 470 N.E.2d 773, 776 (Ind. Ct. App. 1984)).

250. *Id.* at 368-69.

251. *Id.* at 369 (citing Adult Group Properties, Ltd v. Imler, 505 N.E.2d 459, 465-66 (Ind. Ct. App. 1987), *trans. denied*).

252. *Id.*

Next, the court determined that under general principles of law, the guaranty agreement touched and concerned the land because it "further[ed] society's goals of land utilization and free alienability."[253] The totality of the transaction between the parties indicated that the parties fully contemplated the benefits of obtaining complete use of the land, and that the parties did not consider the obligations of the guaranty a disincentive to the transaction. In fact, "the transaction of which the guaranty and covenant [were] a part transformed the burdened property from a 'blighted area' with an impaired value . . . to a revenue-producing shopping center."[254] Accordingly, the covenant's burden on the property bore a reasonable relationship to the benefit enjoyed by the guarantors. [255]

However, the court's inquiry could not end here, because in Indiana, the concepts of touch and concern and privity are not analytically distinct. Privity requires that the interest to be burdened be conveyed contemporaneously with the execution of the guaranty. In this case, neither the Commission's complaint nor the guaranty agreement indicated that there was a transfer of interest among the parties to the transaction, the Commission and the Guarantors. Without privity, the guaranty agreement created a personal obligation, but did not create a covenant that ran with the land.[256]

Finally, the court determined that despite the fact that the covenant did not run with the land, the well-pleaded facts were sufficient to state a claim for enforcement of the Guarantors' obligation as an equitable lien against the property.[257] A lien may be created by contract if the language of the contract and the attendant circumstances indicate the parties' intent to create a lien upon specific property.[258] An equitable lien may be enforced against the original obligor or her heirs, personal representatives, assigns, or purchasers with notice. Because NDC and its mortgagee had actual notice of the covenant and the parties' intent to thereby create a binding obligation, the covenant may be enforced in equity.[259]

The court concluded that the Commission's complaint stated well-pleaded material facts that could entitle it to an equitable remedy. As a result, judgment on the pleadings in favor of NDC was inappropriate, and reversal was ordered.[260]

C. Restrictive Covenants: Residential Use Only

In *Corner v. Mills*,[261] the plaintiffs sought to have restrictive covenants limiting the use of their subdivision lots to residential purposes declared unenforceable. The subdivision tract was divided into thirty-two lots in 1937.

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253. *Id.*
254. *Id.* (citation omitted).
255. *Id.* at 370.
256. *Id.* at 371.
257. *Id.*
258. *Id.* (citing Carmichael v. Arms, 100 N.E. 302, 304 (Ind. Ct. App. 1912)).
259. *Id.*
260. *Id.*
261. 650 N.E.2d 712 (Ind. Ct. App. 1995).

Between 1939 and 1941, four lots were sold without restrictions on their use. In 1942, Lot 11 was sold with restrictive covenants. The covenants limited any structures erected on the lots to detached single family dwellings, contained minimum set-back and cost requirements for such structures, forbade certain commercial and trade behavior, and prohibited tents, trailers, barns or outbuildings from being used as a temporary or permanent residence. In addition, the covenant contained a race restriction prohibiting "persons of any race other than the white race" to use or occupy any building or lot "other than occupancy by domestic servants of a different race."[262]

Two additional lots were sold before 1946, one containing similar covenants and one without them. In 1946, the subdivision was recorded, but no covenants were recorded in the plat index. However, all lot owners joined in the recording and were using their lots for residential purposes. Of the next thirteen lots conveyed, some contained covenants similar to those on Lot 11, others contained residential use restrictions but not race restrictions, one lot was conveyed with restrictions against conducting "noxious or offensive trade or activity," and one lot was conveyed "subject to restrictions of record."[263]

The court observed that at the time of the hearing, there were only two vacant subdivision lots and that the other lots continued to be used for residential purposes only. In addition, all lots in the subdivision were zoned R-1 Single Family Residential.[264]

Fourteen lot owners wanted to use their lots for commercial purposes and brought this action to have the restrictive covenants declared unenforceable. They argued that the race restrictions, which were clearly unconstitutional, could not be separated from the other restrictions without disturbing the intent of the grantors. Thus, the covenants were against public policy.[265] The trial court agreed that the race restrictions were unenforceable, redacted those restrictions from the deeds, and upheld the enforceability of the remaining covenants, including the residential use restriction.[266] The lot owners appealed.

The court of appeals first addressed the racial covenants. Relying on the findings of the trial court, the court of appeals determined that "severing the illegal racial covenants only destroy[ed] a small portion of the covenants' intent. It [did] not affect the prevailing and apparent intent to have Christiana Acres remain residential."[267] The court thereby concluded that the trial court did not err by redacting the original deeds to remove the racial restrictions and ordering that the remaining covenants be enforced.[268]

The plaintiffs also argued that the residential restrictions were unenforceable

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262. *Id.* at 714.

263. *Id.* Because there were 32 subdivision lots, the deeds conveying some of the lots were not directly addressed by the court.

264. *Id.*

265. *Id.* at 715.

266. *Id.* at 714-15.

267. *Id.* at 715.

268. *Id.*

because the lack of uniformity in the restrictions was insufficient to prove the existence of a general plan or scheme for residential development. In support of this argument, the plaintiffs pointed to the fact that some of the lots were conveyed without restrictions prior to the recording of the plat, as well as the fact that the restrictive covenants were not included in the plat itself. The appellate court disagreed, determining that these factors alone did not conclusively prove the lack of a general plan or scheme of residential development.[269] Instead, the court concluded that whether a general scheme or plan of development exists should be determined from the particular circumstances of the case.[270] Relevant to this determination is the language of the deed and the grantor's intent; the failure to include uniform restrictions in all deeds or the failure to include any restrictions in one or more deeds is not conclusive evidence that intent was lacking.[271] Evidence that every lot owner joined in the recording of the plat in 1946, coupled with evidence that after 1946 all transfers of lots consistently contained some type of residential restriction, sufficiently demonstrated the grantor's intent to create a general plan or scheme of development to support the trial court's finding.[272]

The court also addressed the issue of whether commercial development on the thoroughfares surrounding Christiana Acres rendered the residential use restrictions infeasible. In concluding that it did not, the court considered the applicable local zoning classification (which was exclusively residential) and the long standing residential character of the neighborhood.[273] The court observed that the condition of the surrounding areas must undergo radical changes in order to render continued residential use impractical; such changes were not evident in this case. In fact, several newer residents had purchased lots within the subdivision in the past several years, arguably in reliance on the residential use covenants. "Plaintiffs' unilateral speculation that their properties [were] worth more if developed commercially [was] insufficient by itself to nullify the otherwise valid covenants for residential use."[274] The decision of the trial court was affirmed.

V. VENDOR AND PURCHASER

A. Warranty of Title: Damages for Breach

In *Hudson v. McClaskey*,[275] McClaskey purchased a tract of land by warranty deed from Hudson in 1984. The State of Indiana, which had acquired a right-of-way easement over the land prior to the conveyance to McClaskey, subsequently brought a condemnation action against McClaskey. McClaskey defended his title

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269. *Id.* (citing Elliot v. Keely, 98 N.E.2d 374, 379 (Ind. Ct. App. 1951), *trans. denied*; Bachman v. Colpaert Realty Corp., 194 N.E.2d 783, 789 (Ind. Ct. App. 1935)).

270. *Id.*

271. *Id.* (citing *Elliot*, 98 N.E.2d at 379).

272. *Id.* at 716.

273. *Id.*

274. *Id.*

275. 641 N.E.2d 36 (Ind. Ct. App. 1994), *trans. dismissed.*

against the State and filed a cross-complaint against Hudson for breach of warranty of title. The trial court held that the State had a valid easement, but entered summary judgment in favor of Hudson on the cross-complaint.[276] McClaskey appealed.

On appeal, the court reversed summary judgment in favor of Hudson and remanded to the trial court to determine what remedy McClaskey should receive as a result of the breach of warranty.[277] On remand, the trial court allowed rescission of the sale and Hudson appealed. The court of appeals again reversed,[278] holding that rescission was not a proper remedy. This time the Indiana Supreme Court granted transfer, affirmed the court of appeals' determination that rescission was not a proper remedy, and remanded to the trial court with directions "to conduct a hearing to determine all proper damages."[279] On remand, the trial court entered judgment for McClaskey in the amount of $173,486.36, with interest of ten percent from the date of the judgment until satisfaction.[280] Hudson appealed.

The trial court found that the diminution in value of the real estate at issue resulting from Hudson's breach of warranty of title was $60,000.00. Hudson challenged this finding as clearly erroneous. In addressing this issue, the court of appeals observed that the measure of damages for breach of the warranty of title where the title fails completely is the return of the purchase money with interest.[281] Where the grantee is deprived of the use of a portion of the land, the measure of damages is "the value which that specific part of the land bore to the value of the whole tract conveyed," and not just a ratable portion of the purchase price based on the difference in "the quantity of the land purchased to the residue left over after the incumbrance is discovered."[282] Where there is an encumbrance, the measure of damages is the difference between the value of the property with the encumbrance and the value of the property without the encumbrance on the date of the conveyance.[283]

Lee Shaffer, an auctioneer, real estate broker and appraiser of property, testified that because of its commercial development potential the land was worth $3,000 an acre without the easement but only $450 to $625 with the easement.[284] Frederick Bumb, a farmer who had farmed the land for thirty-one years, testified

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276. *Id.* at 39.

277. *Id.* (citing McClaskey v. Bumb & Mueller Farms, Inc., 547 N.E.2d 302 (Ind. Ct. App. 1989), *trans. denied*).

278. *Id.* (citing Hudson v. McClaskey, 583 N.E.2d 1228 (Ind. Ct. App. 1992)).

279. *Id.* (quoting Hudson v. McClaskey, 597 N.E.2d 308, 309 (Ind. 1992)).

280. *Id.* at 40.

281. *Id.* at 41 (citing Sherwood v. Johnson, 62 N.E. 645 (Ind. Ct. App. 1902)).

282. *Id.* (citing First Nat'l Bank v. Colter, 61 Ind. 153, 160 (1878) ("The true and just rule is, that the proportional value, and not the quantity of the several parts of the land, should be the measure of damages.")).

283. *Id.*

284. The court rejected Hudson's contention that Shaffer should not have been allowed to testify as an expert witness because of his lack of formal training in appraising property. *Id.*

that, with the easement, only eighteen acres were suitable as farmland worth $1,000 an acre and the rest of the land was a "swamp."[285] McClaskey testified that without the easement the property was worth $80,000, the purchase price paid to Hudson, but that with the easement the land was worth only $20,000. Based on this evidence, the court concluded that the trial court had correctly used the $80,000 sale price as the value of the land without the easement, and that its determination that the value of the property had diminished by $60,000 when the easement was included was within the range of the evidence.[286]

Next Hudson argued that the trial court erred in awarding attorney fees and engineering fees to McClaskey in the defense of his title. The court acknowledged that although the grantor under a general warranty deed covenants that he will warrant and defend his title, "[i]n Indiana, the party seeking recovery of litigation costs is generally required to tender the defense to the party who breached the covenant of warranty."[287] However, the court observed that the rule requiring notice of the pendency of the suit and a demand that the grantor defend the suit does not apply when the grantor is named as a party to the action.[288]

Because Hudson was named as a party in the State's action to condemn access rights to the easement, a demand was not necessary for McClaskey to recover the costs of defending against the State's claim. Nevertheless, because McClaskey's defense of his title involved two separate tracts of land, only one of which had been purchased from Hudson, the court remanded for a further hearing to determine the amount of litigation costs to be allocated to the defense of Hudson's title. The court rejected the trial court's position that Hudson should pay the entire costs of defending McClaskey's title purely on the theory that a large portion of the defense of both lots was duplicative.[289]

Finally, the court agreed with Hudson that the trial court erred in compounding monthly the interest on the award of damages and expenses. Interest on a damage award should be limited to simple interest. The trial court was directed on remand to calculate the interest on the award as simple interest.[290]

In his cross-claim, McClaskey contended that the trial court should not have allowed Hudson a set-off on his cross-claim for the amount due on the note and mortgage used to purchase the land from Hudson, because there was no evidence that any amount was due. The court disagreed. McClaskey's failure to file an answer to Hudson's cross-claim amounted to an admission of the claim, and on remand the court was directed to admit evidence of the exact amount of the balance remaining due. The decision of the trial court was thus affirmed in part, reversed in part and remanded.

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285. *Id.*

286. *Id.* at 42.

287. *Id.* at 43 (citing Groves v. First Nat'l Bank, 518 N.E.2d 819, 823 (Ind. Ct. App. 1988), *trans. denied*).

288. *Id.*

289. *Id.*

290. *Id.*

B. Oral Contract to Reconvey Land: Statute of Frauds

In *Lux v. Schroeder*,[291] Lux and Schroeder orally discussed purchasing 207 acres of land. They proposed dividing the property into four tracts and agreed upon which of the tracts each would take. Lux proposed that he pay sixty percent of the sale price and Schroeder forty percent. Later Schroeder became dissatisfied with Lux's proposed apportionment of the purchase price, but there was a dispute as to if or when Schroeder communicated his disapproval to Lux. Subsequently, they purchased the land as tenants in common for $475,000, and each party paid one-half of the purchase price and one-half of the cost of surveying the land. Schroeder brought an action to partition the land and Lux sought to enforce the oral agreement regarding the partition of the land and the apportionment of the purchase price. The trial court found that an oral contract existed at the time the offer to purchase the land was submitted, but that the oral contract was unenforceable under the statute of frauds.[292] Judgment was entered ordering the land be partitioned by sale and the proceeds divided equally between the parties.[293] Lux appealed.

The issue raised on appeal was whether the oral contract to reconvey land fell within the statute of frauds. Lux argued that the oral agreement was not within the statute of frauds for two reasons. First, Lux argued that his agreement with Schroeder was an agreement to reconvey the property and not a contract for the sale of land within the meaning of section 32-2-1-1 of the Indiana Code.[294] Lux based this argument on a misinterpretation of *Teague v. Fowler*.[295] In *Teague*, the Indiana Supreme Court concluded that an oral agreement to reconvey property was enforceable in equity because there was "an unmistakable taint of fraud" in the parties refusal to reconvey land pursuant to an oral agreement.[296] The *Teague* court did not create a reconveyance exception to the statue of frauds' writing requirement; nor could the court find any other authority in support of the proposition.[297] Accordingly, the court rejected Lux's argument.[298]

Lux further argued that the statute of frauds was inapplicable because he and Schroeder were joint purchasers of the land at issue with joint possession thereof, and the oral agreement at issue was related to this transaction. In support of this argument, Lux relied on *Green v. Vardiman*, an early case in which the court utilized its equitable powers to enforce an oral agreement regarding the division of property between joint purchasers.[299] The court distinguished *Green* on the basis that the deed in *Green* did not reflect one party's joint ownership of the

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291. 645 N.E.2d 1114 (Ind. Ct. App. 1995), *trans. denied.*
292. *Id.* at 1116.
293. *Id.* at 1115.
294. IND. CODE § 32-2-1-1 (1993).
295. 56 Ind. 569 (1877).
296. *Lux*, 645 N.E.2d at 1117.
297. *Id.*
298. *Id.*
299. *See id.* (citing Green v. Vardiman, 2 Blackf. 324 (1830)).

property despite the fact that he had paid for the property and established a residence thereon.[300] Application of the statute of frauds under such circumstances would have led to an inequitable result.[301] The deed reflected Lux and Schroeder's joint ownership of the property, thus there was no injustice that would warrant the court's use of its equitable powers to suspend the operation of the statute of frauds. The court thereby rejected Lux's argument.[302]

The court further rejected Lux's reliance on the doctrines of promissory estoppel and part performance.[303] Because the trial court correctly determined that the statute of frauds precluded Lux's recovery on the oral agreement, its judgment was affirmed.[304]

C. Doctrine of Merger: Contract Rights Merged into Deed

In *Link v. Breen*,[305] the seller ("Link") warranted, in a rider to the purchase agreement, that the premises were "free from termite or other wood destroying infestation, or damage therefrom." The rider to the purchase agreement provided that Link was to pay for a termite inspection by a reputable pest control company, to "be completed no less than 14 days prior to closing."[306] Should any infestation be discovered, Link was to "assume all cost of eradicating the same and restoring the premises."[307] A termite inspection was conducted by Franklin Pest Control ("FPC") and a report was furnished to the purchasers ("Breens") stating there was no termite infestation. The report was qualified due to FPC's inability to access the entire house. Relying on the report, the Breens closed the sale. One month later, while remodeling, they discovered termite damage to the house.

The Breens filed suit against FPC and Link, alleging breach of contract and seeking damages for failure to discover and disclose the termite infestation. Link filed a motion for summary judgment, which the trial court denied.[308] Link then filed an interlocutory appeal.

By denying Link's motion for summary judgment, the trial court determined that a material question of fact existed as to whether the rider merged into the deed. On appeal, Link argued that summary judgment should have been granted because the unambiguous language of the rider indicated that Link's obligations thereunder merged into the deed, and therefore did not survive the Breens' acceptance of the deed and possession of the property. In response, the Breens argued that Link's duties under the warranty against termite infestation would not arise until the discovery of termites, regardless of when discovery occurred.

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300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* at 1118-19.
304. *Id.* at 1119.
305. 649 N.E.2d 126, 127 (Ind. Ct. App. 1995), *trans. denied.*
306. *Id.*
307. *Id.*
308. *Id.*

The Indiana Court of Appeals agreed with Link that merger by deed precluded recovery by the Breens.[309] Under the doctrine of merger, all prior and contemporary negotiations or executory agreements are merged upon the grantee's acceptance of the deed as performance of the contract, and all rights under the contract are eradicated.[310] The test for merger is the express or implied intent of the parties. If the parties' intent is clear from the deed's language, the deed is decisive; if not, other evidence may be introduced to settle the issue. The court concluded that, based on the plain language of the deed at issue, the parties intended that merger occur in this case.[311]

In so doing, the court rejected the Breens' argument that merger was inapplicable because "the contract create[d] rights collateral to and independent of the conveyance."[312] The Breens argued that the broad language in the rider warranting "that the premises are free from termite or other wood destroying infestation or damage therefrom" created such rights, and should not be merged into the deed. While conceding that when read in isolation this language appeared to create a strict warranty, the court noted that the language in a contract must be read in context.[313] The termite inspection clause contained a specific time frame in which Link was to inspect for and correct termite damage prior to closing. It could not simultaneously impose a limitless duty to inspect at any time after closing, as such would impose unlimited liability. From this language as a whole, it was reasonable to conclude that the parties intended the obligations under the deed not to be collateral and independent, but rather to merge into the deed.[314]

In reaching this conclusion, the court emphasized that the purchase agreement gave the Breens the express option to order an independent inspection. The Breens chose instead to rely solely on Link's inspection; they did so to their own detriment. Because the application of the merger doctrine terminated Link's obligation to the Breens, the trial court erred in denying Link's motion for summary judgment, and reversal was warranted.[315]

VI. LOCAL BUILDING CODES

The Indiana Court of Appeals for the first time addressed section 36-7-8-3 of the Indiana Code[316] in *Robinson v. Monroe County*.[317] In that case, Jesse Cloud Robinson and Sue Ann Mitchell (collectively "Landowners") purchased two acres of real property in Monroe County in 1991. In early 1992, Landowners began construction of a single family dwelling on the property. Although they completed

309. *Id.* at 129.
310. *Id.* at 128 (citing Thompson v. Reising, 51 N.E.2d 488, 491 (Ind. Ct. App. 1943)).
311. *Id.* at 129.
312. *Id.* at 128.
313. *Id.* at 128-29.
314. *Id.* at 129.
315. *Id.*
316. IND. CODE § 36-7-8-3 (1993).
317. 658 N.E.2d 647 (Ind. Ct. App. 1995).

part of the construction on their own, they hired contractors to excavate and prepare foundation trenches, build foundation walls and finish concrete garage floors, build and finish the concrete slab floor, hang and finish the drywall, and install the heating and ventilation system.[318]

The Monroe County Building Code required that various permits be obtained in conjunction with construction of a house including a building permit and an occupancy permit.[319] Landowners refused to obtain the permits and the County subsequently sought an injunction to "enjoin [Landowners] from further erecting, constructing, enlarging, altering, repairing, improving, removing, converting, equipping, using, occupying or maintaining the [house] until all permits required by the Code [had] been obtained."[320] Landowners countered that they were not required to obtain any permits because they were exempted from the permit requirements. The trial court granted the County's motion for summary judgment and Landowners appealed.[321]

On appeal, Landowners contended that they did not have to obtain the permits required under the local building code because they were building a private home, and thus, were exempted from its requirements pursuant to section 36-7-8-3(d) of the Indiana Code.[322] The issue before the Indiana Court of Appeals was whether Landowners' home constituted a home "built by individuals" under the statute.[323]

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318. *Id.* at 649.

319. *Id.*

320. *Id.* (citing Record at 56).

321. *Id.*

322. IND. CODE § 36-7-8-3(d) (1993). The Monroe County Commissioners created the Monroe County Building Code which was applicable to the construction, alteration, repair, use, occupancy, maintenance, and addition to all buildings and structures in the unincorporated areas of Monroe County. The Commissioners also set up the Monroe County Building Department which was granted the powers and duties set out in IND. CODE §§ 36-7-8-1 to -11. *Robinson*, 658 N.E.2d at 649.

323. IND. CODE § 36-7-8-3 (1993) provides:

> (a)The legislative body of a county having a county department of buildings or joint city-county building department may, by ordinance, adopt building, heating, ventilating, air conditioning, electrical, plumbing, and sanitation standards for unincorporated areas of the county. These standards take effect only on the legislative body's receipt of written approval from the fire prevention and building safety commission.
>
> (b) An ordinance adopted under this section must be based on occupancy, and it applies to:
>
> (1) the construction, alteration, equipment, use, occupancy, location, and maintenance of buildings, structures, and appurtenances that are on land or over water and are:
>
> (A) erected after the ordinance takes effect; and
>
> (B) if expressly provided by the ordinance, existing when the ordinance takes effect;

If so, Landowners were not required to obtain the permits.

The County argued that Landowners could not claim the exemption because the exemption was only applicable when a party "personally performs[] all of the construction work on his or her house."[324] The County then claimed that because Landowners hired subcontractors to perform certain jobs on their house, the entire construction project was subject to the requirements of the building code.[325]

In order to determine whether the exemption was applicable to Landowners, the court looked to the legislative intent of section 36-7-8-3[326] and concluded that the underlying purpose of the statute was to promote safety.[327] However, the court observed that the exception set forth in subsection (d) ran afoul of the safety-oriented purpose of the statute in that:

> [E]xempting an individual from the requirements of obtaining authorization for proposed construction and subjecting the completed work to inspection and approval prior to permitting occupancy of the building runs contrary to goal of ensuring safe buildings. Yet, Subsection (d) undeniably creates such an exception from the requirements set out in Section 3.[328]

Based upon this conflict, the court inferred that the only purpose of the exemption in subsection (d) was to remove impedents from those persons who either may not

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> (2) conversions of buildings and structures, or parts of them, from one occupancy classifications to another; and
>
> (3) the movement or demolition of buildings, structures, and equipment for the operation of buildings and structures.
>
> (c) The rules of the fire prevention and building safety commission are the minimum standards upon which ordinances adopted under this section must be based.
>
> (d) An ordinance adopted under this section does not apply to private homes that are built by individuals and used for their own occupancy.

Pursuant to this statute, the Monroe County Building Code required that various permits be obtained in conjunction with the construction of a house.

324. *Robinson*, 658 N.E.2d at 650.

325. *Id.*

326. IND. CODE § 36-7-8-3 (1993).

327. In its original language, the statute read:

> The purpose of the ordinance is to provide for the safety, health and public welfare through structural strength and stability, means of egress, adequate sanitation, plumbing, light and ventilation, and protection of life and property from fire and hazard incident to design, construction, alteration, and for the removal or demolition of buildings and structures in the unincorporated areas of counties having a population between 300,000 and 600,000 according to the last preceding United States census.

Robinson, 658 N.E.2d at 650 (citing 1965 Ind. Acts 348, § 2).

328. *Id.* at 650-51.

possess the skills to construct a home in accordance with "the technical specifications set out in the ordinances" or have the funds to hire professionals or others to build their house.[329] The court stated:

> We can conceive of only one purpose which could justify allowing a builder to circumvent certain applicable building safety ordinances . . . . It may be argued that ordinances such as those contemplated by IC 36-7-8-3, which establishes construction specifications and require permits and inspections for residential construction projects, interfere with the ability of some individuals to build their own home and thus to pursue the American dream.[330]

With this purpose in mind, the court analyzed whether Landowners "built" their house, and thus, were subject to the exemption. The court concluded that the exception applied when the homeowner himself completes a substantial portion of the construction of his home.[331] Because Landowners completed the framing, roofing, finish and cabinet work, electrical work, and the plumbing, the court concluded that this comprised a substantial portion of the construction work necessary for a new house, making the exception contained in section 36-7-8-3(d) applicable.[332]

However, the court determined that section 36-7-8-3(d) did not extend to the work performed by professional subcontractors of others hired to work on a house. The court rationalized that this hiring "indicates that the homebuilder can afford to pay others to do a portion of the construction work, and contractors obviously possess the expertise and equipment to comply with applicable building codes."[333] Accordingly, the court concluded:

> when IC 36-7-8-3(d) operates to exempt an individual from having to comply with the requirements set out in Section 3, any construction work performed by professional subcontractors or others paid by the owner is

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329. *Id.* at 651.

330. *Id.*

331. *Id.* Reaching this conclusion, the court rejected Landowners' contention that under the statute, "built" meant that an individual was responsible for construction, not that he did all the work himself. The court noted that such an interpretation would allow an individual to essentially become a general contractor and hire subcontractors to construct the house without complying with the building code requirements. The court determined that this conflicted with the underlying purpose of the statute which is to relieve those persons who did not have the skills or funds to build a home in accordance with the technical requirements of the codes and allow them to build their home themselves. Therefore, Landowners' interpretation would have allowed persons who could afford to pay professionals to construct their home to be relieved of the code regulations. The court also rejected the County's "all or nothing" approach wherein the exemption could only apply if the person privately constructed every component of the home. To do so, the court stated, would narrow this exception to such an extent as to render it meaningless. *Id.* at 651-52.

332. *Id.* at 651.

333. *Id.* at 652.

> not subject to the exemption and said work must be performed in compliance with all applicable building code requirements.[334]

Thus, the court reversed the trial court's grant of the County's motion for summary judgment which enjoined Landowners from further working on their home.[335]

On rehearing, the court took the opportunity to address the ramifications of its decision in response to Monroe County's petition for reconsideration and the Indiana Fire Prevention and Building Safety Commission's Amicus Curiae Brief in support of rehearing.[336] Writing for the Majority, Judge Friedlander recognized their concerns that "the construction of safe houses is a matter of paramount importance" and that this statutory provision was inconsistent with that objective of insuring safe houses.[337] However, he noted that its decision exempted individuals from only those requirements set forth in Indiana Code section 36-7-8-3 and did "not provide a similar exemption from the requirements set out in Section 4 concerning minimum housing standards and related ordinances."[338]

The court agreed with the County's contention on rehearing that Indiana Code section 36-7-8-3(d) "does not promote the interests of the public at large," because it allows individuals to erect homes that do not meet the minimum safety standards adopted by the Indiana Fire Prevention and Building Safety Commission.[339] Nevertheless, the court emphasized that it could not "ignore the clear language of a statute, regardless of [its] view as to its wisdom."[340] In so doing, the court rejected the Fire Prevention and Building Safety Commission's invitation to narrow the scope of the exemptions to include only log cabin-type dwellings, and to exclude homes in residential areas.[341]

Finally, in response to an issue raised in the Commission's brief, the court clarified the definition of "substantial" as set forth in its opinion.[342] The court

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334. *Id.*

335. *Id.* at 649.

336. Robinson v. Monroe County, 663 N.E.2d 196 (Ind. Ct. App. 1996).

337. *Id.* at 196.

338. *Id.* at 197 (quoting *Robinson*, 658 N.E.2d at 652).

339. *Id.* (quoting Appellee's Petition for Rehearing at 10).

340. *Id.*

341. *Id.* The court noted that "[i]t is not a proper function of this court to, in effect, rewrite a statute in order to render it consistent with our view of sound public policy" and that Commission's and the County's concerns regarding the scope of the exemption should be directed to the legislature not the courts. *Id.* (citing S.V. v. Estate of Bellamy, 579 N.E.2d 144 (Ind. Ct. App. 1991)).

342. *Id.* The Commission stated:

> The Court does not define "substantial." The failure to define "substantial," which could be taken to mean 10%, 25%, 50% or any other value, creates an enforcement nightmare. Many local building departments already have been faced with irate citizens who claim they can avoid codes and permitting [sic], and other departments have had requests, based on the decision in this case, for refunds of building permit fees already collected. Although later litigation could further define "substantial," until that

indicated that the definition of "substantial" should be consistent with its customary meaning: "of ample or considerable amount, quantity, [or] size."[343] Thus, the court concluded, "[I]t would clearly be inconsistent with the ordinary meaning of the term to construe a 'substantial portion' of something as referring to only one-half of the whole."[344] Subject to these comments and clarifications, the court denied the County's petition for rehearing.

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litigation occurs local building officials are left without guidance as to who is covered by their building codes.

Id. (quoting Brief of Amicus at 4-5).

343. *Id.* (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1418 (1967) (alteration in original)).

344. *Id.*

1995 DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

Both the 109th Indiana General Assembly and the Indiana Tax Court contributed to the 1995 changes and clarifications to all of the major, and to many of the minor, Indiana tax laws. This Article highlights some of the more interesting 1995 developments. The following abbreviations are frequently used in this Article: Indiana Department of State Revenue (IDSR) and Indiana State Board of Tax Commissioners (ISBTC).

I. GENERAL ASSEMBLY LEGISLATION

While there were hundreds of 1995 legislative changes that impacted Indiana taxes, virtually none of the changes had any direct effect on a broad segment of Indiana residents. Most of the changes were attempts to fine-tune existing laws, and no significant policy changes surfaced, with two major exceptions.

First, the general assembly, as it does each year, amended the Indiana adjusted gross income tax (IAGIT) law to adopt the definition of the term "adjusted gross income," as that term is used in the federal income tax law.[1] The IAGIT is computed by starting with the amount of a taxpayer's federal adjusted gross income and then making adjustments to that amount in order to arrive at the Indiana Adjusted Gross Income. Because the definition of the term "adjusted gross income" for federal tax purposes did not change from 1994 to 1995, the starting point of Indiana's 1995 definition of the term "adjusted gross income" remained the same as the 1994 definition. Thus, there were no 1995 surprises for Indiana taxpayers with respect to the passing of this federal definition.

The second significant change was that the general assembly changed the Indiana tax law to provide a new schedule of excise tax rates for the Indiana Motor Vehicle Excise Tax (IMVET). The new schedule reduced the 1995 IMVET rates gradually over a period of six years.[2] All IMVET rates were to eventually be reduced by fifty percent, except that no rate was to be reduced below $50. Rates that were already $50 or lower were not to be reduced. Each year, the rates were to be reduced by the same dollar amount, across the board, within the above limitations. During 1996, the general assembly accelerated the rate reduction schedule so that all of the proposed reductions took effect during 1996.[3]

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1. IND. CODE § 6-3-1-11(c) (Supp. 1995).
2. *Id.* § 6-6-5-5.
3. IND. CODE § 6-6-5-5 (Supp. 1996).

Three non-broad based changes that the general assembly made during 1995 are as follows. First, the Indiana Gross Income Tax (IGIT) law was amended in order to provide that receipts from gambling games on river boats are exempt from the IGIT.[4] Second, the general assembly amended the Indiana Property Tax (IPT) law in order to eliminate any charitable exemption for that part of a hospital which is devoted to the operation of a physician's office, unless the office provides charity care or community benefits.[5] Finally, with respect to the procedural rules that govern the tax court, the general assembly amended Indiana Code section 33-3-5-15 in order to require the tax court, whenever the tax court remands a case to the ISBTC under Indiana Code section 6-1.1-15-8, to specify which issues the ISBTC must address.

As a companion to the amendment of Indiana Code section 33-3-5-15, the general assembly also amended Indiana Code section 6-1.1-15-8. The amendment provides that if the tax court vacates, sets aside, or adjudges null and void a final determination of the ISBTC with respect to an assessment by the ISBTC, and the matter is remanded to the ISBTC for reassessment and further proceedings, then the ISBTC is to take action only with respect to those issues that are specified in the tax court's decision. These changes will mitigate problems that have arisen in the following types of cases: those in which an assessment was reversed and remanded for reassessment and the only instruction to the ISBTC was to conduct the reassessment "consistent with [the] opinion";[6] and those in which the ISBTC made determinations that went beyond the matters involved in the remand.

II. INDIANA TAX COURT OPINIONS AND DECISIONS

The tax court published twenty-one opinions and decisions during 1995.[7] Of

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4. IND. CODE § 6-2.1-3-35 (Supp. 1995).

5. *Id.* § 6-1.1-10-16.

6. *See, e.g.*, Western Select Properties, L.P. v. State Bd. of Tax Comm'rs, 639 N.E.2d 1068, 1075 (Ind. T.C. 1994).

7. During 1995, the tax court issued the following twenty-one published opinions which are listed chronologically: Hi-Temp, Inc. v. State Bd. of Tax Comm'rs, 645 N.E.2d 680 (Ind. T.C. 1995); Koufos v. Indiana Dep't of State Revenue, 646 N.E.2d 733 (Ind. T.C. 1995); Rott Dev. Co. v. State Bd. of Tax Comm'rs, 647 N.E.2d 1157 (Ind. T.C. 1995); Indiana Eby-Brown Co. v. Indiana Dep't of State Revenue, 648 N.E.2d 401 (Ind. T.C. 1995); Williams Indus. v. State Bd. of Tax Comm'rs, 648 N.E.2d 713 (Ind. T.C. 1995); Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue, 650 N.E.2d 1223 (Ind. T.C. 1995); Bell v. State Bd. of Tax Comm'rs, 651 N.E.2d 816 (Ind. T.C. 1995); Indiana Dep't of State Revenue v. Estate of Baldwin, 652 N.E.2d 124 (Ind. T.C. 1995); Roehl Transp., Inc. v. Indiana Dep't of State Revenue, 653 N.E.2d 539 (Ind. T.C. 1995); Dalton Foundries, Inc. v. State Bd. of Tax Comm'rs, 643 N.E.2d 548 (Ind. T.C. 1995); Boaz v. State Bd. of Tax Comm'rs, 654 N.E.2d 320 (Ind. T.C. 1995); Two Market Square Assoc. Ltd. Partnership v. State Bd. of Tax Comm'rs, 656 N.E.2d 308 (Ind. T.C. 1995); Associated Ins. Co. v. Indiana Dep't of State Revenue, 655 N.E.2d 1271 (Ind. T.C. 1995); Kimco Leasing, Inc. v. State Bd. of Tax Comm'rs, 656 N.E.2d 1208 (Ind. T.C. 1995); Herb v. State Bd. of Tax Comm'rs, 656 N.E.2d 890 (Ind. T.C. 1995); Musgrave v. State Bd. of Tax Comm'rs, 658 N.E.2d 135 (Ind. T.C.

those, the nine opinions discussed below present the most interesting tax issues. The 1995 cases that are not discussed in this Article are cases involving issues that have been presented to the tax court many times before, will affect very few taxpayers, or that involve facts and/or issues that are of very little interest. The opinions and decisions that are discussed in this Article are presented under an alphabetical listing of the Indiana taxes involved in each case.

A. Indiana Cigarette Tax (ICT)

In *Indiana Eby-Brown Co. v. Indiana Department of State Revenue*,[8] a cigarette distributor petitioned the tax court for a determination of whether the IDSR could assess the Indiana Cigarette Tax (ICT)[9] against the taxpayer without considering that some of the taxpayer's cigarette inventory may have been stolen and that some of the taxpayer's purchased cigarette stamps may have been mutilated. In upholding the IDSR's assessment of the ICT, the tax court stated that a cigarette distributor remains liable for the ICT even though the ICT is presumed to be imposed on the ultimate consumer, and even though the cigarettes involved are lost, stolen, or otherwise missing from the taxpayer's possession.[10]

B. Indiana Death Taxes—Indiana Inheritance Tax (IIT)

In *Indiana Department of State Revenue v. Estate of Nichols*,[11] a decedent's estate petitioned the tax court for a determination of whether a transfer of real property, which was located outside of the State of Indiana, was subject to the Indiana Death Taxes, specifically, to the Indiana Inheritance Tax (IIT).[12] The decedent had established a revocable trust, was trustee of the trust, and had transferred Florida real property to the trust during 1991. The decedent died on June 26, 1993, domiciled in Johnson County, Indiana. When the decedent died, the IDSR maintained that the IIT should be imposed on the value of the decedent's transfer of the Florida real property to the beneficiaries thereof. Had the real property been owned by the decedent (outside of the trust), the value of the transfer of the real property would not have been subject to the IIT.[13] In a nutshell, the tax court had to determine whether the interest in the Florida property, which

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1995); Indiana Dep't of State Revenue v. Estate of Nichols, 659 N.E.2d 694 (Ind. T.C. 1995); The Precedent v. State Bd. of Tax Comm'rs, 659 N.E.2d 701 (Ind. T.C. 1995); Miles, Inc. v. Indiana Dep't of State Revenue, 659 N.E.2d 1158 (Ind. T.C. 1995); Dawkins v. State Bd. of Tax Comm'rs, 659 N.E.2d 706 (Ind. T.C. 1995); Dziacko v. State Bd. of Tax Comm'rs, 659 N.E.2d 1165 (Ind. T.C. 1995).

8. 648 N.E.2d 401 (Ind. T.C. 1995).

9. IND. CODE §§ 6-7-1-1 to -36 (1993 & Supp. 1995). The ICT is an excise tax on cigarettes that the state precollects from cigarette distributors; the distributors place cigarette stamps on individual cigarette packages to evidence that the tax has been paid. *Id.*

10. *Indiana Eby-Brown Co.*, 648 N.E.2d at 404-06.

11. 659 N.E.2d 694 (Ind. T.C. 1995).

12. IND. CODE §§ 6-4.1-1 to -12 (1993 & Supp. 1995).

13. *See* IND. CODE § 6-4.1-2-2(b) (1993).

was held in trust, was an interest in real property or an interest in intangible personal property.

In holding that the value of the Florida real property was subject to the IIT, the tax court stated that a trust interest has the character of real property under Indiana Code section 30-4-2-7(c) only if the trust agreement contains a requirement that the trustee distribute the real property, at some time, to a beneficiary.[14] However, the tax court determined that the beneficiaries' interest under the decedent's trust was an interest in intangible personal property, and therefore, was subject to the IIT for the following reasons: (1) the trust agreement was silent as to whether a distribution of trust property had to be in kind or in cash; (2) the trust agreement granted the trustee broad discretionary powers to deal with and administer the trust principal, including, but not limited to, the explicit power to make distributions whether in kind or in cash; and (3) the trustee's discretion to distribute property in cash or in kind was not restricted by the beneficiaries' wishes, that is, the beneficiaries could not require the trustee to distribute property in kind.[15]

Ironically, Indiana Code section 6-4.1-2-2 was amended, effective July 1, 1993, to provide that the IIT would not apply to a real property interest transfer if the interest transferred was in: (1) real property that was located outside of the State of Indiana, regardless of whether the real property was held in a trust or whether the trustee was required to distribute the real property in-kind; or (2) real property that was transferred to an irrevocable trust during the decedent's life, and the transfer to the trust was not made in contemplation of the transferor's death, and the decedent did not retain an interest in the trust.[16] The amendment provided that the IIT did apply to a property interest transfer if the interest transferred was in real property that was located inside of the State of Indiana, regardless of whether the real property was held in a trust or whether the trustee was required to distribute the real property in-kind. However, the IIT did not apply if the real property was transferred to an irrevocable trust during the decedent's life, and the transfer to the trust was not made in contemplation of the transferor's death, and the decedent did not retain an interest in the trust.[17]

C. Indiana Income Taxes—Adjusted Gross Income Tax (IAGIT)

In *Koufos v. Indiana Department of State Revenue*,[18] the taxpayer petitioned the tax court for a determination of whether the IDSR could disallow the taxpayer's interest payments as being deductible under the Indiana Adjusted Gross Income Tax (IAGIT).[19] The taxpayer paid the interest with respect to a mortgage debt that the taxpayer had incurred in order to develop some rental property. After

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14. *Estate of Nichols*, 659 N.E.2d at 697.

15. *Id.* at 699-701.

16. IND. CODE § 6-4.1-2-2 (1993). This provision does not apply to individuals who died before July 1, 1993.

17. *Id.*

18. 646 N.E.2d 733 (Ind. T.C. 1995).

19. IND. CODE § 6-3-1-3.5 (1993).

the property was developed, the taxpayer sold the property and continued to make interest payments on the debt. Apparently, both the pre-sale and the post-sale interest payments were qualified as investment interest payments under section 163 of the Internal Revenue Code of 1986.[20] Therefore, they were deductible, with certain limitations, for federal income tax purposes.

If the pre-sale interest payments were deductible investment interest payments for federal income tax purposes under section 163, then such pre-sale interest payments would have been deductible in arriving at the taxpayer's federal adjusted gross income under section 62(a)(4) of the Internal Revenue Code of 1986, as expenses that were "attributable to property held for the production of rents or royalties."[21] However, the general issue involved in the case was whether the post-sale interest payments were deductible in arriving at the taxpayer's adjusted gross income for federal income tax purposes. This determination was important for IAGIT purposes, because, as stated above, the IAGIT is computed by starting with the amount of a taxpayer's federal adjusted gross income, and then, making adjustments to that amount in order to arrive at the IAGIT.

To summarize and restate the issues, the tax court in *Koufos* had to determine whether the taxpayer's post-sale interest payments continued to be expenses that were attributable to property held for the production of rents or royalties. Clearly, the post-sale interest payments could continue to be deductible investment interest payments under such section 163, but such post-sale interest payments would not, thereby, automatically continue as payments that were attributable to property held for the production of rents or royalties. If such post-sale interest payments were not within this latter category, then such post-sale interest payments would not have been deductible in arriving at the taxpayer's federal adjusted gross income. Therefore, they would not have been deductible in computing the IAGIT. With all of this in mind, the tax court denied a deduction to the taxpayer for the post-sale interest payments for IAGIT purposes on the theory that such post-sale interest payments were being made with respect to debt that was no longer attributable to the production of rents or royalties.[22]

D. Indiana Income Taxes—Gross Income Tax (IGIT)

In *Associated Insurance Co. v. Indiana Department of State Revenue*,[23] the tax court held that because the spirit and intent of the Indiana Gross Income Tax (IGIT) consolidated filing statute[24] was to treat an affiliated group as a single taxpayer, a member of the Indiana Comprehensive Health Insurance Association (ICHIA) may apply its credit against the full amount of ICHIA's liability for the IGIT.

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20. I.R.C. § 163 (1994).
21. I.R.C. § 62(a)(4) (1994).
22. *Koufos*, 646 N.E.2d at 737-38.
23. 655 N.E.2d 539 (Ind. T.C. 1995).
24. IND. CODE § 6-2.1-5-5(b) (1993).

E. Indiana Carrier Fuel Taxes—Motor Carrier Fuel Tax and Motor Carrier Surcharge Tax (Collectively, IMCFT)

In *Roehl Transport, Inc. v. Indiana Department of State Revenue*,[25] the taxpayer, a commercial motor carrier, petitioned the tax court to determine whether the Indiana Motor Carrier Fuel Tax and the Motor Carrier Fuel Surcharge Tax (collectively, IMCFT) should be imposed on certain fuel that was purchased by the taxpayer for use in the taxpayer's motor vehicles. The two issues before the tax court were: (1) whether a motor carrier was liable for the IMCFT on fuel that was consumed by the taxpayer's motor vehicles while such motor vehicles were idling off the highway; and (2) whether the inclusion of the fuel (which was consumed by the taxpayer's motor vehicles while the motor vehicles were idling off the highway) in the formula used to calculate the IMCFT was constitutional.

After analyzing the applicable statutes and regulations thereunder, the tax court agreed with the taxpayer that not all fuel consumed by a commercial motor vehicle was subject to the IMCFT.[26] The tax court observed that the general assembly had exempted some fuel from the IMCFT if the fuel was consumed for the purpose of operating auxiliary equipment that was installed on the motor vehicles, even if the motor vehicles had a common fuel reservoir for both the locomotion of the motor vehicles and for the operation of such auxiliary equipment.[27] The tax court further stated that there was a presumption that all fuel placed in a supply tank of a commercial motor vehicle was to be consumed "on the highways," unless the motor carrier could show that it used a portion of the fuel to operate the motor carrier's vehicle's auxiliary equipment.[28] The tax court concluded that all fuel consumed by a commercial motor vehicle, not otherwise exempt from the IMCFT, was to be included in the formula for calculating the IMCFT, regardless of where and how the fuel was consumed, including, but not limited to, fuel that was consumed by a motor vehicle when the motor vehicle was idling off the highway for long periods of time.[29] Further, the tax court concluded that the applicable statutory provisions were constitutional.[30]

F. Indiana Procedures for Tax Administration—Indiana State Board of Tax Commissioners (ISBTC)

In *Bell v. State Board of Tax Commissioners*,[31] the tax court was requested to determine, among other things, whether Indiana Code section 21-5-12-7 required the ISBTC to inquire into the propriety of actions taken by school corporations. The tax court found that Indiana Code section 21-5-12-7 authorized the ISBTC to determine whether a lease rental agreement between a lessor corporation and a

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25. 653 N.E.2d 539 (Ind. T.C. 1995).
26. *Id.* at 543.
27. *See* IND. CODE §§ 6-6-4.1-4(d), -4.5(d) (Supp. 1995).
28. *Roehl Transp., Inc.*, 653 N.E.2d at 543.
29. *Id.* at 544.
30. *Id.* at 546-58.
31. 651 N.E.2d 816 (Ind. T.C. 1995).

school corporation was necessary and whether the rental payments were fair and reasonable. In addition to these findings, the tax court also found that section 21-5-12-7 did not authorize the ISBTC to determine whether a school construction project was necessary from an educational standpoint.[32]

In arriving at these conclusions, the tax court built the following road: an administrative agency has only those powers conferred on the agency by the general assembly; powers not in the agency's legislative grant cannot be assumed by the agency nor implied to exist in the agency's powers; the ISBTC is Indiana's property tax specialist, but the ISBTC has no expertise in educational matters; and, Indiana Code section 21-5-12-7 did not make the ISBTC a guarantor that school corporations, the Indiana Department of Education, and/or the State Board of Education would follow their own rules and regulations.[33]

G. Indiana Procedures for Tax Administration—Indiana Counties and County Officials

In *Musgrave v. State Board of Tax Commissioners*,[34] an Indiana county assessor and an Indiana township assessor filed a complaint for an original tax appeal. The tax court was required to determine: (1) whether the tax court had subject matter jurisdiction with respect to the matter presented; (2) whether the assessors had standing to bring the matter to the tax court; and (3) whether the assessors' complaint stated a cause of action with respect to which the tax court could grant relief.

In *Musgrave*, PPG was an Evansville, Indiana manufacturing corporation that was licensed to do business in the State of Indiana. During 1994, PPG challenged the assessment of PPG's business personal property for the tax years 1990, 1991, 1992, and 1993 by filing four Petitions for the Correction of Errors (Forms 133). After considering PPG's Forms 133, the Scott Township Assessor, the Vanderburgh County Auditor, and the Vanderburgh County Treasurer determined that PPG was not entitled to relief and forwarded PPG's Forms 133 to the Vanderburgh County Board of Review. The Vanderburgh County Board of Review then considered PPG's Forms 133 and determined that PPG *was* entitled to relief and reversed the determination of the Scott Township Assessor, the Vanderburgh County Auditor, and the Vanderburgh County Treasurer.

Believing that the Vanderburgh County Board of Review erred, the Scott Township Assessor filed Petitions for Review of Assessment (Forms 131) with the ISBTC. However, the ISBTC dismissed the Scott Township Assessor's Forms 131 on the ground that no statute conferred a right or power on such persons to make such an appeal to the ISBTC.[35] Thereafter, the Vanderburgh County Assessor and the Scott Township Assessor filed the original tax appeal involved in this case, seeking to reverse the ISBTC's final determination. In response, the

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32. *Id.* at 819.
33. *Id.* at 819-20.
34. 658 N.E.2d 135 (Ind. T.C. 1995).
35. *Id.* at 137-38.

ISBTC and PPG filed separate motions asking the tax court to dismiss the appeal.

In addressing such motions, the tax court determined that it had subject matter jurisdiction over the matter involved.[36] The tax court observed that: (1) the tax court had exclusive jurisdiction over any case that arose under the tax laws of the State of Indiana, including, but not limited to, cases that arose from a final determination of the ISBTC;[37] (2) the tax court was created to provide a court that had exclusion jurisdiction over Indiana tax matters (but the tax court was not a court of general jurisdiction); (3) Indiana Code section 6-1.1-15-3(b) required the ISBTC to consider the merits of an assessor's Forms 131, and if the ISBTC refused to do so, the ISBTC thereby denied the assessor a right to review in direct contravention of the law; and (4) it would be anomalous for the tax court to hold that the assessors did not have standing to enforce a right that was specifically granted to the assessors by the general assembly.[38] The tax court stated that county officials might not have standing to challenge the allowance or disallowance of an exemption or of a reduced assessment; however, such officials did have such standing in cases that sought to challenge the ISBTC's interpretation or application of a statute.[39] The tax court held, therefore, that the assessors had standing to bring the case to the tax court.[40] However, with respect to the sufficiency of the assessors' complaint, the tax court stated that the assessors' complaint failed to state a claim upon which relief could be granted; and therefore, the tax court dismissed the case.[41]

In dismissing the case, the tax court reviewed the two methods by which a taxpayer could have appealed a property tax assessment. The tax court explained that the first method was the Petition for Review of Assessment, otherwise known as the "Form 130/131 procedure."[42] Form 130 is used to petition a county board of review for a review of assessment.[43] Form 131 is used to appeal a county board of review's decision on Form 130 to the ISBTC.[44] Form 130 is a prerequisite to Form 131.[45] The second method the court reviewed was the Petition for Correction of Errors, otherwise known as the "Form 133 procedure."[46]

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36. *Id.* at 138.

37. *See* IND. CODE § 33-3-5-2 (1993).

38. *Musgrave*, 658 N.E.2d at 138-39.

39. *Id.* at 139.

40. *Id.*

41. *Id.* at 141.

42. *Id.* at 140. The Form 130/131 procedure and appeal rights thereunder are prescribed by IND. CODE §§ 6-1.1-15-1 to -4 (1993 & Supp. 1995). *See also* IND. ADMIN. CODE tit. 50, rr. 4.2-2-9, 4.2-3-3 (1996).

43. IND. CODE § 6-1.1-15-1 (1993); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996).

44. IND. CODE § 6-1.1-15-3 (1993); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996).

45. IND. CODE § 6-1.1-15-3 (1993); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996). *See also* Reams v. State Bd. of Tax Comm'rs, 620 N.E.2d 758, 759 (Ind. T.C. 1993).

46. *Musgrave*, 658 N.E.2d at 140. The Form 133 procedure and appeal rights thereunder are prescribed by IND. CODE § 6-1.1-15-12 (Supp. 1995). *See also* IND. ADMIN. CODE tit. 50, rr. 4.2-2-9, 4.2-3-12 (1996).

Although both Form 130/131 and Form 133 could have been used to challenge objective errors in an assessment, the two procedures, including appeals therefrom, are separate and distinct.[47] If PPG had filed Forms 130, then the assessors could have appealed the Vanderburgh County Board of Review's decision to the ISBTC by using Forms 131, because Indiana Code section 6-1.1-15-3(b) specifically grants township assessors and members of a county board of review the right to appeal to the ISBTC from a county board of review's determination on a Form 130.[48] PPG, however, did not file Forms 130. Instead, it filed Forms 133, and Indiana Code section 6-1.1-15-12 does not grant township assessors and members of a county board of review the right to appeal to the ISBTC from a county board of review's determination on Form 133.[49]

The only person authorized to appeal to the ISBTC from a determination by a county board of review on Form 133 is a taxpayer.[50] Indeed, Indiana Code section 6-1.1-15-12(e) provides that a taxpayer may appeal a determination of the county board of review to the ISBTC for a final administrative determination.[51] In this case, the taxpayer was PPG, therefore, because no Indiana law authorized township and county assessors to appeal a county board of review's decision on Form 133 to the ISBTC, the tax court determined that the assessors' complaint failed to state a claim upon which relief could have been granted.[52]

H. Indiana State Gross Retail Tax and Indiana Use Tax (Collectively, ISUT)

1. Mechanics Laundry & Supply, Inc. v. Indiana Department of State Revenue.[53]—In *Mechanics Laundry,* the taxpayer was in the business of purchasing shop rags, shop towels, shop mats, shop uniforms, shop shirts, and other materials, and renting such materials to customers, attaching logos to some of the materials, and repairing some of the materials. The taxpayer would then deliver the materials to customers, picking up the materials after the customers had used them for a week, and deliver clean materials to the customers for the next week (cleaning and repairing the materials picked up). The taxpayer continued the delivery, pickup, cleaning, attaching, repairing cycle throughout the year.

The IDSR determined that the taxpayer should pay the Indiana State Gross Retail Tax (the Indiana sales tax), or in lieu thereof, the Indiana Use Tax (collectively, ISUT) when the taxpayer purchased equipment and supplies to clean such materials. As a consequence, the taxpayer petitioned the tax court for a determination of whether the taxpayer came within the scope of one of the exemptions to the ISUT, specifically, the exemptions that are commonly referred to, collectively, as the "industrial exemptions." Among other things, the taxpayer

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47. *Musgrave*, 658 N.E.2d at 140.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 141.
53. 650 N.E.2d 1223 (Ind. T.C. 1995).

maintained that the taxpayer was a "processor," that the taxpayer "processed" tangible personal property, and that the taxpayer was in the business of "processing" tangible personal property as those terms (and variations of those terms) were used in the following ISUT exemption statutes:

> Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of other tangible personal property.[54]
>
> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for his direct use in the direct production of the machinery, equipment, tools, or equipment described in section 2 [Indiana Code section 6-2.5-5-2] or section 3 [Indiana Code section 6-2.5-5-3] of this chapter.[55]
>
> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for the direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture.[56]
>
> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business.[57]
>
> Sales of tangible personal property are exempt from the state gross retail tax if:
>
> (1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, a facility, or structure predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and
> (2) the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture.[58]

In denying every one of the ISUT exemptions to the taxpayer, the tax court first conceded that the Indiana Supreme Court had adopted an expansive definition

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54. IND. CODE § 6-2.5-5-3(b) (1993).
55. *Id.* § 6-2.5-5-4.
56. *Id.* § 6-2.5-5-5.1.
57. *Id.* § 6-2.5-5-6.
58. *Id.* § 6-2.5-5-30.

of the term "production" in order to ensure that all equipment that was used in an integral step of production would qualify for one of the above ISUT exemptions.[59] However, the tax court waived a judicial wand and, despite the absence of any supporting legislative history and despite the fact that every major (perhaps, every) English dictionary in the United States of America categorized the taxpayer as being a "processor" and as being in the business of "processing," read the word "processing" (and all variations thereof) out of the ISUT exemption provisions, so that the word "processing" was no longer on equal footing with the words "'production, manufacture, fabrication, assembly, extraction, mining, . . . refining or finishing.'"[60] At the same time, the tax court also repositioned the word "processing" (and all variations thereof) so as to read the ISUT exemption provisions as exempting persons who were involved in a "production process" or in a "manufacturing process" or in an "assembly process," etc.

The tax court found that the taxpayer's cleaning, repairing, and other activities with respect to the shop rags, shop towels, shop mats, shop uniforms, shop shirts, and other materials, merely returned them to the same character or composition that the materials had been in when they were initially purchased by the taxpayer.[61] Having inserted the requirement in such ISUT exemption provisions—that taxpayers must be, for example, manufacturing or producing property (and not merely processing) in order to come within the scope of such ISUT exemptions provisions—the tax court determined that there was no manufacturing or producing of other property when the taxpayer processed dirty clothes into clean clothes which the taxpayer then rented to other persons.[62]

2. *Miles, Inc. v. Indiana Department of State Revenue.*—Another case involving the Indiana State Gross Retail Tax and the Indiana Use Tax was *Miles, Inc. v. Indiana Department of State Revenue*.[63] In *Miles*, the taxpayer was a manufacturer of various health care products, including, but not limited to, Alka-Selzer products. During the years involved, the taxpayer purchased promotional materials and stored the promotional materials in its Indiana warehouses. Later, the taxpayer shipped approximately ninety-seven percent of these promotional materials to the taxpayer's sales representatives in other states. The taxpayer also purchased bulk quantities of discount coupons for insertion into the boxes of the taxpayer's Alka-Selzer products, each coupon providing a discount on the holder's next purchase of an Alka-Selzer product. The boxes in which the discount coupons were inserted stated that the discount coupon was inside the box.

Eventually, the IDSR claimed that the taxpayer was subject to the Indiana State Gross Retail Tax (the Indiana sales tax) and the Indiana Use Tax

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59. Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue, 650 N.E.2d 1223, 1229 (Ind. T.C. 1995).

60. *Id.* at 1227, 1229-32 (quoting IND. CODE § 6-2.5-5-3(b) (1993)). The tax court cited case law from Indiana and other states to support its interpretation. The tax court also purported to follow legislative intent.

61. *Mechanics Laundry & Supply, Inc.*, 650 N.E.2d at 1229-33.

62. *Id.*

63. 659 N.E.2d 1158 (Ind. T.C. 1995).

(collectively, ISUT) due to the taxpayer's storage of the promotional materials and the discount coupons. Thereafter, the taxpayer petitioned the tax court for a determination of the application of the ISUT. After the taxpayer filed the petition, the IDSR sent the taxpayer three "Letters of Resolution," which letters indicated that the IDSR had resolved the dispute with the taxpayer. However, as the tax court proceedings progressed, the respondent stated that these letters did not bind the IDSR to any particular settlement. Therefore, the tax court had the following three issues to resolve: (1) whether the IDSR released the taxpayer from liability when the IDSR mailed to the taxpayer the three "Letters of Resolution"; (2) whether the ISUT applied to the promotional materials that the taxpayer temporarily retained in its Indiana warehouses, but which (ninety-seven percent of them) were ultimately shipped to the taxpayer's sales representatives in other states; and (3) whether the taxpayer's discount coupons were exempt from the ISUT under either the ISUT incorporation exemption[64] or the ISUT resale exemption.[65]

With respect to the issue of whether the taxpayer's liabilities were mitigated by the three letters of resolution, the tax court observed that the letters were sent to the taxpayer after the taxpayer had filed the petition with the tax court and that Indiana Code section 4-6-2-11 provided that no "'claim in favor of the state shall be compromised without the approval of the governor and the attorney-general, and such officers are hereby empowered to make such compromise when, in their judgment, it is in the interest of the state so to do.'"[66] In interpreting Indiana Code section 4-6-2-11, the tax court stated that, at the times when the IDSR sent such letters to the taxpayer, the IDSR no longer had authority to settle the disputes involved in the case or to cancel the taxpayer's tax liability without the approval of the Governor and Attorney General of the State of Indiana, which approval had not been given.[67]

With respect to the application of the ISUT to the taxpayer's storage of promotional materials, the tax court agreed with the taxpayer that such promotional materials were exempt from the ISUT under the definition of the term "storage."[68] The statutory definition reads as follows: "the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana."[69]

With respect to the application of the ISUT to the taxpayer's storage of the discount coupons, the tax court considered the application of the following ISUT exemption provision: "Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his

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64. IND. CODE § 6-2.5-5-6 (1993).
65. *Id.* § 6-2.5-5-8.
66. *Miles*, 659 N.E.2d at 1162 (quoting IND. CODE § 4-6-2-11 (1993)).
67. *Id.* at 1163.
68. *Id.* at 1164.
69. IND. CODE § 6-2.5-3-1(b) (1993).

business."[70] The tax court determined that this ISUT exemption provision was not applicable to the taxpayer's storage of the discount coupons, because, while Alka-Selzer products alleviated acid indigestion, heartburn, and other physical maladies, and while each ingredient in an Alka-Selzer product was essential to the product, the discount coupons were not essential to an Alka-Selzer product.[71] The tax court also determined that the discount coupons neither hindered nor enhanced an Alka-Selzer product's effectiveness, and in fact, the discount coupons had no impact on the physical effects of an Alka-Selzer product. Rather, the discount coupons' only effect was to reduce the price of a customer's next purchase of one of the taxpayer's Alka-Selzer products, and this effect was far removed from the purpose of an Alka-Selzer product—to alleviate individuals' physical maladies.[72] Thus, the tax court concluded that the discount coupons were not a material part of an Alka-Selzer product, and therefore, did not qualify for the incorporation exemption in Indiana Code section 6-2.5-5-6.[73]

With respect to the application of the ISUT resale exemption to the discount coupon storage issue, the tax court examined the ISUT resale exemption provision, which reads as follows: "Transactions involving tangible personal property are exempt from the ISUT if the person acquiring the property acquires the property for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property."[74] After such examination, the tax court concluded that the taxpayer's customers did not pay an itemized amount for the discount coupons and that no bargaining occurred between the taxpayer and the taxpayer's customers as to the face value of the discount coupons or as to the Alka-Selzer products to which the discount coupons applied.[75] For these reasons, the tax court concluded that the taxpayer did not resell the discount coupons to the taxpayer's customers within the meaning of Indiana Code section 6-2.5-5-6.[76]

III. INDIANA TAX COURT DECISIONS REVERSED BY THE INDIANA SUPREME COURT

A. Indiana Controlled Substance Excise Tax (ICSET)

On July 1, 1992, the Indiana Controlled Substance Excise Tax (ICSET),[77] which levied a tax on the delivery, possession, and manufacture of controlled substances, came into effect. Specifically, the ICSET was imposed on persons who delivered or possessed or manufactured controlled substances in the State of Indiana, in violation of Indiana Code section 35-48-4 or 21 U.S.C. sections 841

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70. *Id.* § 6-2.5-5-6.
71. *Miles*, 659 N.E.2d at 1164.
72. *Id.*
73. *Id.*
74. IND. CODE § 6-2.5-5-8 (1993).
75. *Miles*, 659 N.E.2d at 1165.
76. *Id.*
77. IND. CODE §§ 6-7-3-1 to -17 (1993).

through 852. The ICSET did not apply to a controlled substance that was distributed, manufactured, or dispensed by a person who was registered under Indiana Code section 35-48-3.[78] If the ICSET was not paid when the ICSET was due, the person who was liable for the ICSET would be subject to a penalty of one-hundred percent of the ICSET, in addition to the ICSET.[79] The amount of the ICSET was based upon the weight and class of the controlled substance involved.[80]

After the ICSET became effective, Indianapolis, Indiana and Speedway, Indiana law enforcement officers confiscated marijuana from various individuals and charged these individuals with crimes. Thereafter, these law enforcement authorities shared the information about the alleged illegal activities with the IDSR, and the IDSR made jeopardy assessments of the ICSET against some of the individuals. The IDSR began collection activities against the individuals in order to collect the ICSET, the one-hundred percent penalty, certain fees and other charges, and interest with respect to such amounts.

Several of the individuals subject to the collection activities filed petitions for hearings with the tax court[81] regarding the IDSR's collection activities. In four separate cases, at least one of the petitioners had pled guilty to or had been convicted of a crime. The petitions presented the following four major constitutional issues to the tax court: (1) whether the ICSET violated the privilege against self-incrimination under the Fifth Amendment to the United States Constitution; (2) whether the ICSET violated the taxpayers' equal protection rights under the Fourteenth Amendment to the United States Constitution; (3) whether the ICSET violated the taxpayers' due process rights under the Fourteenth Amendment to the United States Constitution; and (4) whether the ICSET violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

With respect to the self-incrimination issue, the tax court held that the ICSET did not compel a person, who was liable for the ICSET, to reveal any self-incriminating information. The court further concluded that even if the ICSET did have such a requirement, the ICSET granted use immunity and derivative use immunity over all of the confidential information which the IDSR acquired.[82] Therefore, the tax court held that the ICSET did not violate the Fifth Amendment's privilege against self-incrimination.[83]

With respect to the equal protection rights issue, the tax court stated that

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78. *Id.* § 6-7-3-5.

79. *Id.* § 6-7-3-11(a).

80. *Id.* § 6-7-3-6.

81. Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. T.C. 1994), *rev'd in part*, 660 N.E.2d 310 (Ind. 1995); Hall v. Indiana Dep't of State Revenue, 641 N.E.2d 694 (Ind. T.C. 1994), *rev'd in part*, 660 N.E.2d 319 (Ind. 1995); Bailey v. Indiana Dep't of State Revenue, 641 N.E.2d 695 (Ind. T.C. 1994), *rev'd*, 660 N.E.2d 322 (Ind. 1995); Hayse v. Indiana Dep't of State Revenue, 641 N.E.2d 698 (Ind. T.C. 1994), *rev'd*, 660 N.E.2d 325 (Ind. 1995).

82. *Clifft*, 641 N.E.2d at 686-89.

83. *Id.* at 689.

because an Indiana Code section 35-48-3 registration was a nullity as to activities and controlled substances that were beyond the scope of the ICSET, any person who delivered, possessed, or manufactured a controlled substance in violation of Indiana Code section 35-48-4 or 21 U.S.C. sections 841 through 852, was simply not registered under Indiana Code section 35-48-3 for purposes of the ICSET.[84] Thus, the tax court concluded, the ICSET did not discriminate between Indiana Code section 35-48-3 registrants and non-registrants and, therefore, there was no equal protection violation.[85]

With respect to the due process issue, the tax court stated that the moment a person received a jeopardy assessment from the IDSR, with the IDSR's concomitant payment demand, and before the IDSR issued a tax warrant and began collection efforts, the person assessed had the ability to seek injunctive relief from the tax court. The court noted that the procedure allowed for review in a meaningful time and a meaningful manner before a court of competent jurisdiction, and thus, the procedure satisfied due process.[86]

Finally, with respect to the double jeopardy issue, the tax court stated that the ICSET was a punishment for double jeopardy purposes.[87] Therefore, the IDSR was not entitled to collect the ICSET from any petitioner who had already pled guilty to or been convicted of a Class A misdemeanor.[88] The Indiana Supreme Court reversed the tax court's decision with respect to the double jeopardy issue.[89] The supreme court held that the ICSET was a punishment that attaches at the moment of the assessment of the ICSET.[90] Consequently, in each case, the assessment was the first jeopardy and the conviction or plea bargain was the second jeopardy, the latter being contrary to the double jeopardy clause.

B. Indiana Financial Institutions Tax (FIT)

In *Fort Wayne National Corp. v. Indiana Department of State Revenue*,[91] the taxpayer was a bank which carried on business in the State of Indiana, and the IDSR attempted to impose the Indiana Financial Institution Tax (IFIT)[92] on the taxpayer with respect to certain municipal bond income that the taxpayer received during 1990. The IFIT, which took effect on January 1, 1990, was an 8.5% levy on the remainder of a taxpayer's apportioned income or adjusted gross income

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84. *Id.* at 690.

85. *Id.*

86. *Id.* at 691.

87. *Id.* at 692-93.

88. *Id.* at 693.

89. Clifft v. Indiana Dep't of State Revenue, 660 N.E.2d 310 (Ind. 1995); Hall v. Indiana Dep't of State Revenue, 660 N.E.2d 319 (Ind. 1995); Bailey v. Indiana Dep't of State Revenue, 660 N.E.2d 322 (Ind. 1995); Hayse v. Indiana Dep't of State Revenue, 660 N.E.2d 325 (Ind. 1995).

90. *Clifft*, 660 N.E.2d at 313; *Hall*, 660 N.E.2d at 321; *Bailey*, 660 N.E.2d at 324; *Hayse*, 660 N.E.2d at 326.

91. 621 N.E.2d 668 (Ind. T.C. 1993).

92. IND. CODE §§ 6-5.5-2-1 to -8 (1993).

minus the taxpayer's deductible Indiana net operating losses and net capital losses.[93] In the taxpayer's petition to the tax court, the taxpayer alleged that such municipal bond income was exempt from the IFIT because Indiana Code section 6-8-5-1(a), which is part of the Indiana General Exemption Statute (IGES), provided, in part, that:

> All bonds issued after March 11, 1959, or notes, warrants, or other evidences or indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the state inheritance tax.[94]

Based primarily on an historical analysis of the relevant statutory provisions, the tax court determined that the IDSR improperly included the municipal bond income in computing the taxpayer's IFIT liability.[95] However, the supreme court made a different analysis of the issue and held that such municipal bond income could be used in computing the IFIT. The court noted that the IFIT was not a direct tax on the municipal bonds or on the municipal bond income. Thus, the court concluded that the IFIT was levied on franchises as an excise tax on the exercise of the corporate privilege of operating as a financial institution in the State of Indiana.

C. Indiana Motor Carrier Fuel Taxes—Motor Carrier Fuel Tax and Motor Carrier Surcharge Tax (Collectively, IMCFT)

In *Bulkmatic Transport Co. v. Indiana Department of State Revenue*,[96] the taxpayer was a commercial motor carrier, which transported liquid and dry bulk commodities throughout Indiana and surrounding states. In order to transport commodities, the taxpayer used specially designed tractor/trailer vehicles with pneumatic pumping equipment and with a common fuel reservoir for transportation and for the operation of the motor vehicle's auxiliary equipment. With respect to the years involved, the IDSR assessed additional Indiana Motor Carrier Fuel Taxes (collectively, IMCFT)[97] against the taxpayer.

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93. *Id.* § 6-5.5-2-1(a).
94. *Id.* § 6-8-6-1(a).
95. *Fort Wayne Nat'l Corp.*, 621 N.E.2d at 677.
96. 629 N.E.2d 955 (Ind. T.C. 1995), *rev'd*, 648 N.E.2d 1156 (Ind. 1995).
97. IND. CODE §§ 6-6-4.1-1 to -27 (1993 & Supp. 1995).

The IMCFT was imposed on a motor carrier due to the consumption of fuel in the motor carrier's vehicles on Indiana highways. The IMCFT was not imposed on that portion of such fuel which was used for the purpose of operating any equipment that was mounted on a motor vehicle, even though the motor vehicle had a common reservoir of fuel which was used both for locomotion on an Indiana highway and for the operation of such auxiliary equipment.[98] The type of motor vehicle determined the portion of fuel that was excluded from the IMCFT. Thus, the taxpayer petitioned the tax court in order to have the tax court determine whether the taxpayer's motor vehicles received a partial exemption, as tank trucks, under Indiana Administrative Code Title 45, Rule 13-4-7(b) (45 I.A.C. 13-4-7(b)).

As provided in 45 I.A.C. 13-4-7(b), the IMCFT did not apply to twenty-four percent of the motor fuel that was consumed on Indiana highways by a tank truck which had a common fuel reservoir for both locomotion on the highway and for operation of pumping equipment. However, the regulations also provided, in Indiana Administrative Code Title 45, Rule 13-4-7(f) (45 I.A.C. 13-4-7(f)), that the administrator determined which portion of the IMCFT imposed under Indiana Code section 6-6-4.1-4 did not apply to the motor fuel consumed on Indiana highways by fire trucks, street sweepers, and other motor vehicles that had a common fuel reservoir for both locomotion on the highway and for operation of other equipment. This partial exemption applied only after a showing, by the motor carrier, of the proportion of motor fuel that the motor carrier used for the operation of equipment other than for locomotion along the highway, and by a presentation of documents and information as requested by the administrator.

In *Bulkmatic Transport*, the taxpayer claimed that the taxpayer's motor vehicles were within the scope of 45 I.A.C. 13-4-7(b), and therefore, the taxpayer was entitled to a twenty-four percent exemption of fuel purchases. The IDSR, on the other hand, claimed that the taxpayer's motor vehicles were within the scope of 45 I.A.C. 13-4-7(f), and therefore, the taxpayer was entitled to only a fifteen percent exemption of fuel purchases, based on the facts presented to the IDSR and the administrator's decision.

After reviewing the applicable statutory and regulatory provisions, the tax court concluded that the only requirement which had to be met in order for a motor carrier's fuel purchases to qualify for the twenty-four percent exemption was that the motor carrier use "tank trucks." The court concluded that a "tank truck" was a truck which had "a common fuel reservoir for both locomotion on the highway and operation of the pumping equipment."[99] Further, the tax court determined that the ordinary and accepted meaning of the term "tank truck" was broad and that, for purposes of the twenty-four percent exemption, the term included both motor vehicles with single unit configurations and motor vehicles with tractor/trailer combinations.[100] The tax court held that the taxpayer was entitled to the twenty-four percent exemption for fuel purchases because the taxpayer's motor vehicles

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98. *Id.* § 6-6-4.1-4(d) (Supp. 1995).

99. *Bulkmatic Transp. Co.*, 629 N.E.2d at 957-58; IND. ADMIN. CODE tit. 45, r. 13-4-7(b)(2) (1996).

100. *Bulkmatic Transp. Co.*, 629 N.E.2d at 957-58.

qualified as "tank trucks" under 45 I.A.C. 13-4-7(b).[101]

The Indiana Supreme Court determined that such a conclusion presupposed that pneumatic trucks were entitled to the twenty-four percent exemption and that, at some later time, the exemption for fuel purchased for pneumatic trucks was reduced to fifteen percent.[102] The supreme court determined that this presupposition was erroneous because the taxpayer had not shown, nor did the record reveal, any evidence that the IDSR had ever subjected pneumatic trucks to an IMCFT exemption percentage other than fifteen percent.[103] The supreme court also noted that ambiguous exemption statutes were to be strictly construed against a taxpayer.[104] The court concluded that the tax court's failure to give any weight to the IDSR's historically uniform interpretation of 45 I.A.C. 13-4-7 violated the principle of strictly construing exemption statutes against a taxpayer.[105]

D. Indiana Procedures for Tax Administration—Taxpayer's Failure to Remit Indiana State Gross Retail Tax and Indiana Use Tax (Collectively, ISUT) and to Remit the Indiana Adjusted Gross Income Tax and Indiana County Tax (Collectively, IAGIT), which Taxes were Withheld by the Taxpayer due to the Payment of Wages by the Taxpayer

In *Safayan v. Indiana Department of State Revenue*,[106] the taxpayer was the president of a corporation that operated a restaurant and did not remit Indiana State Gross Retail Taxes (ISUT) to the IDSR. The taxpayer also failed to remit Indiana Adjusted Gross Income Taxes and County Income Taxes (collectively, IAGIT) to the IDSR when the corporation paid wages to employees of the corporation. When the IDSR learned that such taxes were not remitted, the IDSR began collection proceedings against both the corporation and the taxpayer, claiming that the taxpayer was personally liable for such delinquent taxes. Later, the IDSR claimed that a general partnership, the partners of which included the taxpayer, was the owner and operator of the restaurant.

Based upon the above facts, the tax court determined that there were two general issues which the tax court had to address. First, the tax court had to decide if the corporation was liable for the delinquent sales and withholding taxes of the restaurant. Second, it had to determine if the taxpayer was personally liable for the delinquent sales and withholding taxes of the corporation. In discussing these separate liabilities, the tax court stated that the ISUT was an excise tax that was imposed on retail transactions made in Indiana.[107] It explained that, with some

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101. *Id.* at 958.

102. Bulkmatic Transp. Co. v. Indiana Dep't of State Revenue, 648 N.E.2d 1156, 1159 (Ind. 1995).

103. *Id.*

104. *See* General Motors Corp. v. Indiana Dep't of State Revenue, 578 N.E.2d 399, 404 (Ind. T.C. 1991), *aff'd*, 599 N.E.2d 588 (Ind. 1992).

105. *Bulkmatic Transp. Co.*, 648 N.E.2d at 1159.

106. 631 N.E.2d 25 (Ind. T.C. 1994), *rev'd*, 654 N.E.2d 270 (Ind. 1995).

107. IND. CODE § 6-2.5-2-1(a) (1993).

exceptions, the person who acquired property in a retail transaction was liable for the ISUT on the transaction and was required to pay the ISUT to the retail merchant as a separate added amount to the consideration in the transaction. The court went on to explain that the retail merchant was required to collect the ISUT as the agent for the State of Indiana.[108]

With respect to the IAGIT that was withheld by the corporation, the tax court observed that every employer who made payments of wages which were subject to tax under Indiana Code section 6-3, regardless of the place where such payments were made, and who was required under the provisions of the Internal Revenue Code[109] to withhold, collect, and pay over income tax on wages paid by such employer to such employee, was required, at the time of payment of such wages, to deduct and retain therefrom the amount of IAGIT that was prescribed in the withholding instructions which were issued by the IDSR.[110] The tax court further observed that an employer who made payments of any wages was liable to the State of Indiana for the payment of the tax required to be deducted and withheld from such wages, and that such employer must file returns with the IDSR and make payments of such withheld amounts to the IDSR.[111] The tax court then held that the corporation was the owner and operator of the restaurant business and that the corporation had engaged in retail transactions and paid wages. Therefore, the corporation was liable for the ISUT and for the amounts that were required, by Indiana law, to be withheld from the wages that were paid by the corporation.[112]

With respect to the taxpayer's personal liability for the delinquent taxes, the tax court first examined Indiana Code section 6-2.5-9-3 which provided that an individual, who was an employee, officer, or member of a corporate or partnership retail merchant and who had a duty to remit the ISUT to the IDSR, held such taxes in trust for the State of Indiana and was personally liable to the State of Indiana for the payment of such taxes, plus any penalties and interest attributable to such taxes.[113] The tax court also examined Indiana Code section 6-3-4-8(f) which stated that a corporate or partnership employer, and every officer, employee, or member of such employer, who, as such officer, employee, or member, was under a duty to deduct and remit withholding taxes, was personally liable for such taxes, penalties, and interest.

The tax court concluded that the taxpayer's personal liability for the payment of the delinquent sales and withholding taxes plus interest and penalties was based on a two-prong analysis: (1) whether the taxpayer was an officer; and (2) whether she had a duty to remit the taxes to the IDSR.[114] Because the taxpayer was the president of the corporation, the tax court stated that the sole remaining question

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108. *Safayan*, 631 N.E.2d at 27; *see also* IND. CODE § 6-2.5-2-1(b) (1993).
109. I.R.C. §§ 3401-3509 (1994).
110. *Safayan*, 631 N.E.2d at 27-28.
111. *Id.* at 28; *see also* IND. CODE § 6-3-4-8(a) (Supp. 1995).
112. *Safayan*, 631 N.E.2d at 27-28.
113. IND. CODE § 6-2.5-9-3 (1993).
114. *Safayan*, 631 N.E.2d at 28.

was whether the taxpayer was under a duty to remit the delinquent taxes.[115] With respect to this issue, the tax court observed that the taxpayer lacked the authority to sign checks, disburse corporate funds, hire and fire employees, pay wages to the employees, decide which creditors and in what order the creditors would be paid, and to pay sales or payroll taxes. Another individual had signed an employment agreement with the corporation, which provided that such individual's duties would include, but would not be limited to, supervision, management, selection of personnel, and maintenance and preparation of accurate and current financial information, documentation and records.

The tax court recognized that Indiana Code section 23-1-36-2 provided that each corporate officer had the authority and obligation to perform the duties which were stated in the bylaws or, to the extent consistent with the bylaws, the duties which were prescribed by the board of directors. The court also noted that the corporation's bylaws provided in pertinent part that the president was to discharge all of the duties which devolve upon a presiding officer, and perform such other duties as the code of by-laws provided or as the board of directors prescribed. However, because the taxpayer's interest and involvement in the corporation was more as an investor and not as a manager of the restaurant, the tax court held that the taxpayer did not have the duty to remit the delinquent taxes and was not personally liable for the delinquent sales and withholding taxes of the corporation.[116]

The Indiana Supreme Court reversed the tax court's decision with respect to the taxpayer,[117] concluding that a person in the taxpayer's position [118] had the authority to see that the State of Indiana received its money. The supreme court explained that "these trustees cannot escape responsibility and liability merely by 'compartmentalizing responsibilities within a business . . . and adopting a hear no evil—see no evil' policy."[119]

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115. *Id.*

116. *Id.* at 29.

117. Indiana Dep't of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

118. The corporation, named G.D.G.F., Inc., was a closely held corporation. Mrs. Safayan was the highest ranking official in the corporation (president), was a member of its board of directors, and was a major shareholder.

119. *Safayan*, 654 N.E.2d at 275 (quoting Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987)).

TORT LAW REFORM (?) AND OTHER DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

After several large, and in some minds unjustified, jury verdicts,[1] "Tort Reform" became a national theme in 1995. The big news in Indiana tort law was the passage of the Tort Reform Act[2] which made several changes in Indiana tort law and raised many questions. In addition to tort reform, several Indiana cases resolved ambiguities in the law and answered questions of first impression in areas such as governmental immunity, the Fireman's Rule, and Dram Shop Liability.

I. TORT LAW REFORM

On April 26 and 27, 1995, the General Assembly of the State of Indiana enacted House Enrolled Act Number 1741, overriding the veto of Governor Evan Bayh. Commonly called the "tort reform" statute[3] (the "Act"), it substantially modified existing law in the tort and products liability fields. Although the latter is beyond the scope of this Article,[4] several aspects of the Act, as well as several provisions that promise to have the most significant effect on Indiana law will be discussed herein.

A. Retroactive or Prospective Application of the Act

Although it is certainly only one of many tort reform issues sure to be litigated in upcoming years, the first issue to make its way through Indiana's federal and state courts is the applicability of the provisions of the Act to pending cases, as well as cases which accrued prior to its passage. The possible retroactive

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1. *See, e.g.*, BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994) (reducing $4 million punitive damage award to $2 million), *rev'd*, BMW of North America, Inc. v. Gore, 64 U.S.L.W. 4335 (U.S. May 20, 1996) (holding $2 million punitive damage award unconstitutionally excessive in light of compensatory damages of only $4,000); Leibeck v. McDonald's Corp., CV-93-2419 (2d Jud. Dist. Ct. N.M. Aug. 18, 1994) (jury award of $2.9 million to woman who spilled hot coffee on her lap).

2. 1995 Ind. Acts 278.

3. Ind. H. Enrolled Act No. 1741, Pub. L. No. 278-1995 (codified at scattered sections of the Indiana Code). The Act is reproduced in the Appendix to this Article.

4. For a complete discussion of the Act's changes in the area of products liability, see Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979 (1996).

application of the Act, each section and possibly each subsection, must be analyzed separately. For example, section 16 specifically provides that the sections which create "new" statutory provisions[5] are to "apply to a cause of action that accrues after June 30, 1995."

This specific prospective application of certain portions of the Act, however, has also provided support for the argument (primarily from defense counsel) that the legislature intended the other portions of the Act to be applied retroactively. This argument is based upon the doctrine of *expressio unius est exclusio alterius*.[6] Additionally, parties favoring retroactive application argue that the remedial purpose of the amendments indicate the legislature's intent for those amendments to apply to pending cases.

Under Indiana law, amendments that are procedural or remedial in nature may be retroactively applied to pending cases unless doing so would impair some vested right or constitutional guarantee.[7] This raises the substantial question of whether the amendment in question is procedural or remedial in nature. Legislation is "procedural" when it provides "a substantially similar remedy while delineating more clearly the procedure to be followed in determining and enforcing the right."[8] A statute is considered "remedial" in two instances: if it provides the means by which rights are enforced; *or* if it is designed to cure a defect in a statute, or remedy some mischief that existed in the statute.[9] Even if "a new remedy is afforded for the enforcement of an existing right, the statutes

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5. IND. CODE §§ 33-1-1.5-4.5, 33-1-1.5-9, 33-1-1.5-10, 34-4-34-3, 34-4-34-4, 34-4-34-5, 34-4-34-6 & 34-4-44.6 (Supp. 1995).

6. *Expressio unius est exclusio alterius* means "the expression of one thing implies the exclusion of any others." *See* City of Peru v. Utility Serv. Bd., 507 N.E.2d 988, 992 (Ind. Ct. App. 1987); Health & Hosp. Corp. of Marion County v. Marion County, 470 N.E.2d 1348, 1355 (Ind. Ct. App. 1984) ("It is important to recognize what statutes do not say as well as what they do say. When certain words are specified in a statute, then, by implication, other words not specified are excluded.").

7. *See* The Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 719 (S.D. Ind. 1991); Malone v. Connor, 189 N.E.2d 590 (Ind. App. 1963); Connecticut Mut. Life Ins. Co. v. Talbot, 14 N.E. 586 (Ind. 1887).

8. Tarver v. Dix, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981).

> Where no new rights are given or existing rights taken away, and the new legislation only provides a new remedy for the enforcement of an existing right, retroactive operation may be given to a remedial statute where such construction is necessary to carry out the purpose of the new law.

McGill v. Muddy Fork of Silver Creek, 370 N.E.2d 365, 370 (Ind. App. 1977). *See also In re* Smith, 60 N.E.2d 147, 149 (Ind. App. 1945).

Moreover, under Indiana law "[i]t is recognized that the legislature may, by a subsequent statute, correct any omission or irregularity in a proceeding which it might have dispensed with by a prior statute." W.H. Dreves, Inc. v. Osolo School Tp., 28 N.E.2d 252, 254 (Ind. 1940) (citing Follett v. Sheldon, 144 N.E. 867 (Ind. 1924)).

9. RLJ v. TLE, 454 N.E.2d 1268, 1270 (Ind. Ct. App. 1983).

may be given retroactive application."[10]

A statute that would otherwise be applied retroactively may not be so applied if its application would violate vested rights.[11] Classifying the amendments as violating the vested right of the particular plaintiff in question has also been

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10. *Id.* (quoting Malone v. Conner, 189 N.E.2d 590 (Ind. App. 1963)). *See also* Hine v. Wright, 36 N.E.2d 972, 976 (Ind. App. 1941); Hiatt v. Howard, 8 N.E.2d 136, 138 (Ind. App. 1937).

11. *See McGill*, 370 N.E.2d at 370; *The Pantry, Inc.*, 777 F. Supp. at 719.

> [I]n order for a right to vest . . . it must be immediate, absolute, complete, unconditional, perfect within itself and not dependent upon contingency . . . . Moreover, it is well settled a mere expectance of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.

Foley v. Consolidated City of Indianapolis, 421 N.E.2d 1160, 1168 (Ind. Ct. App. 1981) (citations omitted); *accord*, Bailey v. Menzie, 542 N.E.2d 1015, 1019 (Ind. Ct. App. 1989). The term "vested" has been defined as follows:

> To be "vested," a right must be more than a mere expectation based on an anticipation of the continuance of existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from the demand of another.

BLACK'S LAW DICTIONARY 1401 (5th. ed. 1979).

It has long been established in Indiana that a plaintiff does not have a "vested right" in any particular remedy. Rather, the legislature is empowered to modify existing remedies. Davis v. Rupe, 17 N.E. 163, 165 (Ind. 1888); Railway Express Agency v. Harrington, 88 N.E.2d 915, 915 (Ind. App. 1949). In *Davis*, the court stated:

> As has often been declared, there can be no vested right in remedies, provided they are not so changed as to be rendered nugatory. Hence, it is that whatever belongs to the remedy merely is within the control of the legislature, subject only to the limitation that an adequate and reasonable mode of enforcing the right must remain or be provided which leaves the value of the contract without substantial depreciation or impairment.

Davis, 17 N.E. at 165.

A party's "right" to any particular remedy does not become "vested" until a judgment is entered that specifically grants that remedy to the party. *See generally* Glick v. Department of Commerce, 387 N.E.2d 74 (Ind. Ct. App. 1979). In *Glick*, the provision of the Tort Claims Act removing the plaintiff's ability to collect interest on his judgment against the state was enacted prior to the judgment, but after the cause of action accrued. Under the doctrine pronounced in *Davis*, the court held that the statute should apply to the case, because the plaintiff was not being denied a remedy to which he ever had a vested right. *Id.* at 77.

Likewise, in Tarver v. Dix, 421 N.E.2d 693 (Ind. Ct. App. 1981), a paternity action was filed in 1978 because the defendant denied being the father of his paramour's child. In 1979, the legislature passed Indiana Code section 31-6-6.1-9 that codified a common law presumption that a child born to a married couple was the child of the husband. The trial took place in 1980 and the court applied the new statutory section, although it was not enacted until after the cause of action accrued and was filed. The Indiana Court of Appeals held that the statute was properly retroactively applied to pending cases because the new legislation "did not impair or take away any previously existing rights, nor did it deny a remedy for the enforcement of such rights." *Id.* at 696.

extensively litigated in Indiana trial courts following passage of the Act.

The Indiana Court of Appeals recently held that the nonparty provisions of the Act amending Indiana Code section 34-4-33-2 should not have been applied retroactively by a trial court.[12] In *Chestnut*, the trial court allowed the defendant to name the plaintiff's father, who was the driver of the vehicle, as a nonparty. Because Indiana's Guest Statute[13] precluded the father from being named as a defendant, the prior version of the Indiana Comparative Fault Act would have barred the naming of the father as a nonparty. The trial court found such a bar to be a defect of the prior law, because the father driver who was not technically liable could have been ninety-nine percent at fault, with the defendant driver being only one percent at fault and yet forced to pay one-hundred percent of the damages.[14] The trial court further found that the amendment cured this defect.

The Indiana Court of Appeals reversed the trial court's decision.[15] In addressing retroactivity, the *Chestnut* court placed great weight on the presumption that absent an express legislative intent to apply the statute retroactively, it is presumed that the legislature intended prospective application.[16]

The defendant argued that because the nonparty provisions were not listed in section 16's express statement of prospective application, the legislature must have intended retroactive application. The court rejected this "silence is deafening" argument, finding that it was not sufficiently explicit to overcome the presumption of prospective application. The court then concluded that the portion of the Act amending Indiana Code section 34-4-33-2 had prospective application only. Although the decision limited its holding to this portion of the Act, it is clear that the court's rationale would also apply to the remaining portions of the Act that are not specifically delineated by section 16.[17]

B. Intentional Acts as "Fault"

Section 8(1) of the Act amends Indiana Code section 34-4-33-2 to include intentional acts and omissions as potential fault. This is a significant change in Indiana tort law, particularly in regard to claims based upon a failure to protect others from harm. The appropriateness of this change depends on who one feels

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12. Chestnut v. Roof, 665 N.E.2d 7 (Ind. Ct. App. 1996).

13. IND. CODE § 34-4-40-3 (1993).

14. *Chestnut*, 665 N.E.2d at 8.

15. In rejecting the defendant's argument that the application sought was actually prospective because it was applied to a jury instruction which had not occurred, the court of appeals held that the amendment was not related to procedure at trial. Instead, it changed substantive law by altering the definition of a nonparty.

16. The *Chestnut* court cited Brane v. Roth, 590 N.E.2d 587, 590 (Ind. Ct. App. 1992), and Turner v. Town of Speedway, 528 N.E.2d 858, 863 (Ind. Ct. App. 1988).

17. Two federal district courts in Indiana have also found that the products liability amendments of the Act should not be applied retroactively. *See* Smith v. Ford Motor Co., No. 1:93CV0143 (N.D. Ind. Nov. 2, 1995); Brashear v. Leprino Foods Co., 897 F. Supp. 1167, 1169 (N.D. Ind. 1995).

should bear the risk of being injured by a judgment proof defendant. If, for example, a plaintiff bank customer is injured by a bank robber, partially caused by inadequate bank security, the judgment proof (presumably due to a lack of assets) bank robber will certainly receive a high percentage of the fault in the case. Although plaintiff's counsel will argue that the victim of the shooting cannot be fully compensated under the new definition of fault, defense counsel will point out that one of the prime purposes of the comparative fault act was to limit defendant's financial responsibility to the degree of the fault, and that the amendment accomplishes this purpose.

C. Expansion of the Definition of "Nonparties"

Section 8(2) of the Act amends Indiana Code section 34-4-33-2(a)(2) to eliminate the requirement that a nonparty be potentially liable to the claimant, and that a nonparty cannot be the employer of the claimant. Like section 8(1), this section will have a significant impact on Indiana cases. How one views the appropriateness of this change will depend upon how one views the importance of full claimant compensation versus limiting the defendants' liability to their respective percentage of fault. It is clear that the legislature has made the decision that defendants should not have to bear the financial burden of governmental immunities and other factors that might prevent the naming of a person or entity at fault as a defendant.

Section 8(2) will also likely allow defendants to generally identify nonparties whose precise identity may not be known. For example, if one of the vehicles fled the scene of an automobile accident, this amendment would likely allow their being named as a nonparty through a general description. While a contrary argument would likely be made that Indiana Code section 34-4-33-6 requires the verdict form to disclose the *name* of the nonparty, section 8(2) would likely be seen as the controlling, substantive provision.

D. Jury Instructions

Section 9 of the Act makes it clear that juries are not to be informed of any immunity defense that might be available to a nonparty, and that in assessing percentage of fault, it is not to consider whether the person could or could not have been named as a party in the case. This is consistent with the other provisions of the Comparative Fault Act amendments. Knowledge of the immunity could only serve to prejudice jurors who wish to insure full compensation for a plaintiff and therefore provide a defendant with a disproportionately high percentage of fault.

E. Punitive Damage Limitation

Section 10 of the Act prohibits juries from being informed of the punitive damage limitation or partial assignment to the treasurer of the State. Section 11 of the Act creates a punitive damages cap of three times the amount of compensatory damages awarded in the action, or $50,000, whichever is greater. This punitive damage limitation will likely operate in a similar manner as the

damage limitation of the Indiana Tort Claims Act,[18] in that no mention of the limitation will occur until an award is made in excess of the limitation, which would then be subject to remittitur. Although this limitation will likely be subject to a constitutional challenge, a successful challenge would most likely have to characterize the punitive damage claim as a "vested right," a dubious claim at best. While it is unlikely a federal or state constitutional challenge to the punitive damage limitation would succeed,[19] a number of difficult procedural and substantive questions will likely arise from the Act's procedure for allocating punitive damages between plaintiffs and the treasurer of the State of Indiana, who deposits a share of the funds into the violent crime victims compensation fund established by Indiana Code section 5-2-6.1-40. These latter issues will be discussed in the following subpart.

F. Part of Punitive Damage Award to State

Section 13 of the Act creates Indiana Code section 34-4-34-6, which provides that, except as provided in Indiana Code section 13-7-8.7-10, when a judgment that includes a punitive damage award is entered in a civil action, the defendant shall pay the punitive damage award to the clerk of the court where the action is pending. The clerk shall then pay the person to whom the punitive damages were awarded twenty-five percent of the punitive damage award and the remaining seventy-five percent of the punitive damage award is paid to the state treasurer, who shall deposit the funds into the violent crime victims compensation fund.

These provisions may have several effects. First, plaintiffs may not file or may dismiss punitive damage claims. This could be caused by the decreased proportional amount of punitive damages available to plaintiffs (and possibly their counsel on contingency fee cases, as the statute makes no mention of any deduction for attorney's fees from the seventy-five percent that is deposited into the violent crime victims compensation fund). Plaintiffs may decide that aggravating factors which might otherwise justify punitive damages could be used instead to increase compensatory damages. As the threat of punitive damages has historically been used to coerce (or encourage, depending on one's viewpoint) the settlement of compensatory damage claims, it is unlikely that the number of punitive damage claims filed will drop. Instead they will be dismissed on the eve of trial if settlement efforts fail.

Another issue involves the question of when, if at all, the successful plaintiff can dismiss the punitive damage judgment in exchange for full satisfaction (and possibly even more than full satisfaction) of an accompanying compensatory damage award. Once the punitive damage judgment is entered, does the State of Indiana have an enforceable property interest sufficient to preclude such a dismissal or compromise without its consent? If so, how does the original and the

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18. IND. CODE §§ 34-4-16.5-1 to -22 (1993).

19. *See, e.g.*, Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) (striking down limit on noneconomic damages as unconstitutional but upholding constitutionality of punitive damage limitations).

"new" governmental plaintiff coordinate settlement/appellate efforts?

In order for these provisions to be applied in a predictable way to Indiana litigants, the appellate courts will need to provide substantial guidance as to the various parties' rights and responsibilities in regard to the prosecution and distribution of punitive damage awards.

G. Qualified Settlement Offers

Section 14 of the Act creates Indiana Code section 34-4-44.6, which establishes a detailed procedure for defendants making offers of settlement, termed "qualified settlement offers." Qualified settlement offers may be made at any time after a complaint has been filed in a civil action, but may not be made less than thirty days before a trial of the action. Qualified settlement offers must resolve all claims and defenses at issue in the civil action between the offeror and the recipient before the qualified settlement offer may be accepted.

In order to invoke the provisions of the statute, the requirements of making a qualified settlement offer must be satisfied. The qualified settlement offer must be in writing, signed by the offeror's attorney, be designated as a qualified settlement offer, be delivered to each recipient or recipient's attorney by registered or certified mail or by any method verifying the date of receipt, set forth the complete terms of the settlement proposal in sufficient detail to allow the recipient to decide whether to accept or reject it, include the name and address of the offeror and the offeror's attorney, and expressly revoke all prior qualified settlement offers.

Similarly, an acceptance of a qualified settlement offer must be unconditional, in writing, signed by the accepting recipient or the accepting recipient's attorney and delivered by registered or certified mail or by a means that verifies the date of receipt to the offeror or the offeror's attorney not more than thirty days after the recipient receives the qualified settlement offer. If a recipient does not accept the qualified settlement offer and the final judgment is less favorable to the recipient than the terms of the qualified settlement offer, the court shall award attorney's fees, costs, and expenses to the offeror upon the offeror's motion, up to $1,000. Additionally, the attorney's fees shall not exceed a rate of $100 per hour. The statute also creates certain procedural and timing requirements.[20]

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20. IND. CODE § 34-4-44.6 (Supp. 1996) reads as follows:

A motion for an award of attorney's fees, costs, and expenses under this section must be filed not more than thirty (30) days after entry of judgment. The motion must be accompanied by an affidavit of the offeror or the offeror's attorney establishing the amount of the attorney's fees and other costs and expenses incurred by the offeror after the date of the qualified settlement offer, constituting prima facie proof of the reasonableness of the amount.

Where appropriate, the trial court may order a judgment entered against the offeror and in favor of the recipient reduced by the amount of attorney's fees, costs, and expenses awarded to the offeror under this section.

Because the offeror's refund of attorney's fees, costs, and expenses is limited if the offeree receives less than the offer at trial or other final judgment, it is unlikely that the qualified settlement offer will substantially affect the way Indiana cases are litigated. Perhaps the greatest impact will be seen in questionable claims that might be subject to summary judgment. If these provisions are held to apply to any type of judgment, including summary judgment, defendants may begin to offer minimal, token settlement offers in order to recover some of their attorney's fees, costs, and expenses if the summary judgment is granted. If the plaintiff concludes that it is unlikely he or she may survive the summary judgment motion, more cases may be dismissed pursuant to agreement once the motion and settlement offer are filed. Such situations, however, are unlikely to ever amount to more than a small percentage of cases in the civil litigation system.

II. CASE LAW DEVELOPMENTS

A. Governmental Immunity

1. Prosecutorial Immunity.—One question of first impression decided during this survey period was the extent of prosecutorial immunity for conduct during civil child support actions. In *Clifford v. Marion County Prosecuting Attorney*,[21] a father alleged that the prosecutor's office had engaged in harassment in its attempts to collect child support from him.[22] The prosecutor's office had allegedly filed income withholding orders in violation of court orders, mistakenly determined that he was in arrears, refused to correct errors when they were discovered, and failed to notify the IRS and credit bureaus that he was no longer in arrears.[23]

In holding that the prosecutor's office was immune from liability, the court determined that the public policy reasons for granting immunity to prosecutors in child support actions were as compelling as the reasons for granting immunity in the criminal context.[24] "[V]igorous enforcement of child support obligations increases the probability both that children's physical and educational needs will be met and that such occurs with minimal additional burden on the taxpayers."[25] In addition, even though some of the acts were allegedly done in bad faith and in violation of court orders, the acts were not outside the scope of prosecutorial immunity. Just as prosecutors are immune from liability for claims arising from filing criminal charges in bad faith, they are immune from claims of enforcing child support orders in bad faith.[26] "In view of the fact that the primary tort which arises from initiating legal proceedings necessarily includes the element of bad faith, the presence of bad faith cannot remove the conduct from the very protection

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21. 654 N.E.2d 805 (Ind. Ct. App. 1995).
22. *Id.* at 807.
23. *Id.* at 807-08.
24. *Id.* at 809.
25. *Id.*
26. *Id.*

envisioned by the Act."[27]

2. Immunity for Delegated Functions.—The Court of Appeals reemphasized the need for municipalities to exercise caution when delegating responsibility for activities normally considered discretionary functions. In *Jacobs v. Board of Commissioners*,[28] a woman brought a personal injury action against the Morgan County Board of Commissioners, the County Council, and the County Highway Department after she was injured in a car accident on a county road. She alleged that the county was negligent in failing to place a warning sign before a ninety degree curve in the road.[29] The county moved for summary judgment on the basis that placement of warning signs was a discretionary function and it was immune from liability pursuant to Indiana Code section 34-4-16.5-3.[30]

Under the "planning-operational" test set forth in *Peavler v. Board of Commissioners*,[31] the county would be immune if the decision resulted from "a policy-oriented decision-making process."[32] The court determined that the county did not undertake a systematic process for deciding which improvements to make and whether to place signs or other traffic control devices on the roads.[33] Instead, the county delegated the decision to the County Highway Engineer.[34] He drove around the county and, when he determined a need for a sign, he informed the sign installer.[35] He did not engage in any systematic balancing or cost-benefit analysis nor did he follow-up with the Board of Commissioners concerning the sign placement.[36] Because there was no showing that the county assessed priorities or weighed budgetary considerations, there was no discretionary decision-making and, under the *Peavler* analysis, no immunity.[37]

3. Fire Department Liability.—In *Willis v. Warren Township Fire Department*,[38] the court limited the discretionary function immunity of a fire department under the Tort Claims Act.[39] The Willis family brought an action against the fire department alleging negligence after a fire at their home. The department believed that it had extinguished the fire and left. Apparently, however, some embers were still smoldering and erupted into flames again.[40] The court noted:

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27. *Id.* (citing Jacobs v. City of Columbus, 454 N.E.2d 1253 (Ind. Ct. App. 1983)).
28. 652 N.E.2d 94 (Ind. Ct. App. 1995).
29. *Id.* at 96.
30. *Id.*
31. 528 N.E.2d 40 (Ind. 1988).
32. *Jacobs*, 652 N.E.2d at 98.
33. *Id.* at 100.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. 650 N.E.2d 321 (Ind. Ct. App. 1995).
39. IND. CODE § 34-4-16.5-3(6) (Supp. 1995).
40. *Willis*, 650 N.E.2d at 323.

> that most, if not all, of the actions undertaken and decisions made by fire departments during the course of actually fighting a fire involve allocation of resources, the balancing of risks and benefits, and cannot adequately be reviewed by resort to traditional tort standards. Such decisions thus exemplify exercises of the policy-formulation discretion which is shielded by immunity under I.C. 34-4-16.5-3(6).[41]

However, the Willis' complaint was not based on the decisions made while fighting the fire.[42] Instead, the fire department was following a predetermined policy of remaining at the scene until the fire was extinguished, rather than making decisions concerning the allocation of resources.[43] That decision was not a planning decision and, thus, not afforded immunity under the statute.[44] The court concluded that while a fire department is immune from liability for decisions concerning how to fight a fire, it is not immune for failing to properly extinguish it.

4. Constitutionality of Tort Claim Limit.—In the recent case of *In re Train Collision at Gary*,[45] the Indiana Court of Appeals addressed an appeal of an order partially dismissing claims brought by passengers, spouses, next of kin, and personal representatives of deceased passengers who were involved in a commuter railway accident. The court first concluded that the Commuter Transportation Districts Act[46] was not an unconstitutional special law, did not unconstitutionally regulate business, and did not otherwise violate the Indiana Constitution. The court then addressed the issue of whether the liability limitations of the Indiana Tort Claims Act violated Article I, Sections 12 or 23 of the Indiana Constitution.

Indiana Code section 34-3-16.5-4 provides a limitation of liability in the amount of $300,000.00 for the injury to or death of one person in any one occurrence and $5,000,000.00 for injury to or death of all persons in that occurrence. The plaintiff class contended that these liability limitations, as applied to them, violated Article I, Section 23 of the Indiana Constitution.[47] The court of appeals then discussed *Collins v. Day*,[48] which adopted a three part analysis of a statute's potential unconstitutionality under this Section. First, in order to be constitutional, the disparate treatment accorded by the statute must be reasonably related to inherent characteristics that distinguish the unequally treated classes. Second, the preferential treatment must be uniformly and equally applicable to all persons similarly situated. Third, this test also acknowledges that in conducting

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41. *Id.* at 325.

42. *Id.* at 326.

43. *Id.* at 325.

44. *Id.*

45. 654 N.E.2d 1137 (Ind. Ct. App. 1995).

46. IND. CODE §§ 8-5-15-1 to -26 (1993).

47. IND. CONST. art. I, § 23 provides that "[t]he general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

48. 644 N.E.2d 72 (Ind. 1994).

the analysis courts must exercise substantial deference in favor of the legislative act in question.[49]

The plaintiff class essentially maintained that the statute was unconstitutional as applied to the class because travelers on other railways in the state would not be subject to the liability limitations of the Tort Claims Act. After acknowledging that the legislative purpose of Tort Claims Act was to limit the financial responsibility of governmental entities by restricting potential tort damages and discouraging excessive litigation, the court acknowledged that the intent of the transportation act was to maintain the availability and accessibility of interstate commuter transportation in Indiana. By applying the Tort Claims Act limitations on liability to commuter transportation districts, the legislature furthered these overall purposes. The court then concluded that application of the liability limitations to the plaintiff class' claims was rationally related to the state interest, and that the liability limitations were constitutional under the first prong of the *Collins* test.[50] The court then held that because the liability limitations apply equally and uniformly to all persons injured on railways operated by commuter transportation districts, the second prong of the *Collins* test was also satisfied.[51] In light of the substantial deference that must be given to statutes, the application of the liability limitations was constitutional.

The plaintiff class also argued that the liability limitations violated Article I, Section 12 of the Indiana Constitution.[52] The court recognized that although the constitutionality of the liability limitations of the Tort Claims Act under this provision was a question of first impression, it noted that the Indiana Supreme Court had previously upheld statutes that limited a litigants right to recover damages in other ways.[53] The court of appeals concluded that a citizens right to sue a governmental entity derived not from constitutional rights but from rights of common law. Thus, the right to sue a governmental entity for damages as provided in the Tort Claims Act was a right granted at common law that could also be restricted by legislative act. The court then concluded that the legislative purpose behind these liability limitations could not be deemed constitutionally repugnant simply because they restricted the amount of damages available to the plaintiff class. The liability restrictions were within the authority of the legislature to enact and did not violate Article I, Section 12 of the Indiana Constitution.

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49. *In re Train Collision*, 654 N.E.2d at 1146.

50. *Id.*

51. *Id.* at 1147.

52. IND. CONST. art. I, § 12 provides that: "All courts shall be open; and every person; for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay."

53. *See* State v. Rendleman, 603 N.E.2d 1333, 1335 (Ind. 1992); Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 594 (Ind. 1980); Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976).

B. Fireman's Rule

Two cases were decided this survey period regarding the scope of the Fireman's Rule. First, granting transfer in a case decided last survey period,[54] the Indiana Supreme Court clarified the application of the Fireman's Rule. In *Heck v. Robey*,[55] the court agreed that professional rescue workers, such as paramedics, do not come within the scope of the rescue doctrine.[56] However, it disagreed with the court of appeals that the rule acts as a complete bar to recovery.[57]

Heck was driving while intoxicated and was injured when his truck went into a ditch. While Robey and his partner attempted to lift Heck out of the ditch, Heck became violent. Robey's partner had to restrain Heck which left most of the lifting to Robey. Robey alleged that he injured his back due to Heck's actions.[58]

The supreme court noted that Indiana first recognized the Fireman's Rule in 1893.[59] Originally the doctrine "held that a landowner owed no duty to a firefighter responding to a fire on the landowner's property except 'to abstain from positive wrongful acts.'"[60] The rule was expanded by the court of appeals to "'[provide] that professionals, whose occupations by nature expose them to particular risks, may not hold another negligent for creating the situation to which they respond in their professional capacity.'"[61] However, the *Heck* court determined that the Fireman's Rule was not an *absolute* bar to a claim by a professional rescuer.[62] The court of appeals had determined that Robey incurred the risk of injury when he chose to pursue a career as a paramedic. However, the supreme court recognized that the defense of incurred risk as a complete defense was no longer viable under the current comparative fault scheme.[63] Instead, any risk incurred was to be considered by the fact finder when apportioning fault.[64] Thus, although the Fireman's Rule barred a claim for injuries resulting from Heck's need to be rescued, it did not bar a claim arising from any positive wrongful acts committed by Heck during the rescue attempt.

In the second case involving the Fireman's Rule,[65] the court of appeals declined to extend application of the rule to include building inspectors. In *Sam v. Wesley*, a building inspector was injured when he slipped and fell down a flight

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54. Heck v. Robey, 630 N.E.2d 1361 (Ind. Ct. App. 1994). For a discussion of this case, see Andrew P. Wirick & Ann Marie Waldron Piscione, *Survey of Tort Law Developments in 1994: The Good, The Bad and The Ugly*, 28 IND. L. REV. 1097, 1105-06 (1995).

55. 659 N.E.2d 498 (Ind. 1995).

56. *Id.* at 502.

57. *Id.* at 503.

58. *Id.* at 500.

59. *Id.* at 503 (citing Woodruff v. Bowen, 34 N.E. 1113 (Ind. 1893)).

60. *Id.* (quoting *Woodruff*, 34 N.E. at 1113).

61. *Id.* (quoting Koehn v. Devereaux, 495 N.E.2d 211, 215 (Ind. Ct. App. 1986)).

62. *Id.* at 503-04.

63. *Id.* at 505.

64. *Id.*

65. Sam v. Wesley, 647 N.E.2d 382 (Ind. Ct. App. 1995).

of stairs while inspecting a house. The court noted that "'the rule's scope and our application is narrow.'"[66] The court concluded that because building inspectors were not subject to the risks of responding to emergencies and rescuing people that were present in the other occupations included within the Fireman's Rule (i.e., police officers, fire fighters, and paramedics), they were not included within the scope of the Fireman's Rule.[67]

C. Dram Shop Act Violations

Two cases were decided this survey period concerning liability for a violation of the Dram Shop Act.[68] In *National Railroad Passenger Corp. v. Everton*,[69] the court considered the duration of the duty owed by a supplier of alcohol to an intoxicated person and how that duty could be discharged. Everton was a passenger on a train owned by National Railroad Passenger Association ("Amtrak"). Everton became intoxicated while on the train and the railroad employees allegedly continued to serve him. When he was found unconscious on the train, the railroad contacted the Montgomery County Sheriff's Office and had him removed from the train. Everton attempted to stand in his jail cell and fell, injuring his head. The jail employees summoned medical assistance. Everton later attempted to stand again and struck his head on the floor. He suffered brain damage as a result of the fall.[70]

Everton's guardian sought damages from Amtrak and the sheriff's department. Amtrak moved for judgment on the pleadings asserting that it owed no duty to Everton after the sheriff's department took custody of him. The court, however, disagreed. It reasoned that simply because the sheriff's department also owed Everton a duty of care, this did not extinguish Amtrak's duty.[71] Instead, Amtrak's duty was to refrain from serving Everton alcohol after he was intoxicated and the duty had already been breached when Amtrak turned him over to the sheriff's department.[72] Liability was not cut off at the tavern door.[73] Instead, Amtrak and the sheriff's department jointly owed a duty to Everton.[74] The court left the issue of proximate cause to the jury.[75]

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66. *Id.* at 385 (quoting Kennedy v. Tri-City Comprehensive Community Mental Health Ctr., 590 N.E.2d 140, 143 (Ind. Ct. App. 1992)).

67. *Id.* at 385-86.

68. IND. CODE § 7.1-5-10-15.5(a) (1993) provides:

> It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated.

69. 655 N.E.2d 360 (Ind. Ct. App. 1995).

70. *Id.* at 362.

71. *Id.* at 366.

72. *Id.* at 365.

73. *Id.* at 366.

74. *Id.* at 365.

75. *Id.* at 366-67.

The dissent argued that Amtrak's duty ended when it gave custody of Everton to the sheriff's department because it relinquished control of Everton's actions.[76] The dissent noted that without a right to control his actions, no duty could exist. Given its broad language, however, this case appears to hold that once a supplier of alcohol violates the Dram Shop Act, it is powerless to limit its liability for injury.

The second case involving liability under the Dram Shop Act focused on the definition of the term "furnish" in the Act. In *Estate of Cummings v. PPG Industries, Inc.*,[77] employees of PPG organized a party at a local tavern. The management of PPG was not involved in planning the party or negotiating the agreement with the tavern. The company did allow the employees to post flyers about the party at the plant and contributed some money toward the cost of the party. The tavern, however, was responsible for checking identification to ensure that no minors attended the party and for serving the alcoholic beverages.[78] An underage employee, Duffy, obtained admittance to the party and became intoxicated. Although his supervisor was at the party and knew he was underage, he was not able to prevent Duffy from leaving the party intoxicated. On his way home, Duffy was involved in an accident in which Cummings was killed.[79] Cummings' estate brought an action against PPG alleging a violation of the Dram Shop Act that resulted in Cummings' death.

The court held that PPG was not liable under the Dram Shop Act because it did not furnish Duffy with the alcohol. Simply supplying money that would be used for alcohol was not furnishing alcohol.[80] Instead, the court concluded that the term "furnish" contemplated an active means by which a person obtains alcohol.[81] In order to be an active means, PPG would have had to exercise some control over the alcohol which it did not.[82] Therefore, PPG had no liability under the Dram Shop Act.[83]

D. Miscellaneous Clarifications and Questions of First Impression

1. Viability of the Last Clear Chance Doctrine.—One question that has been left unanswered is whether the last clear chance doctrine survived the enactment of the Comparative Fault Act.[84] In *Hull v. Taylor*,[85] the court answered the question in the negative. The doctrine of last clear chance arose in order to alleviate the harshness of contributory negligence under the former tort system that

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76. *Id.* at 368.
77. 651 N.E.2d 305 (Ind. Ct. App. 1995).
78. *Id.* at 307.
79. *Id.*
80. *Id.* at 308 (citing Rauck v. Hawn, 564 N.E.2d 334 (Ind. Ct. App. 1990)).
81. *Id.*
82. *Id.*
83. *Id.*
84. IND. CODE §§ 34-4-33-1 to -14 (1993).
85. 644 N.E.2d 622 (Ind. Ct. App. 1994).

prevented a plaintiff who was even minimally negligent from recovering.[86] The last clear chance doctrine allowed the fact finder to weigh the relative negligence of each party.[87] However, the *Hull* court reasoned that because weighing of fault is now accomplished under the Comparative Fault Act, there is no need for the last clear chance doctrine.[88]

2. Definition of Brother and Sister in the Guest Statute.—The Indiana Guest Act[89] bars claims by certain individuals for injuries resulting from an accident involving a motor vehicle absent willful or wanton conduct.[90] In *Akers v. Sebren*[91] and *Murphy v. Cole*,[92] the court determined that half-siblings are not included within the terms of the Guest Act. Because the Act is unambiguous, the words are to be given their plain meaning.[93] The primary meaning of the term sister is "a female human being related to another person having the same parents as another."[94] Because half-sisters do not have the same parents, they are not included under the terms of the Guest Act and are not barred from bringing a claim.[95]

3. Negligent Hiring of an Independent Contractor.—Last survey period, in a divided opinion, the court of appeals held that Indiana recognized a separate tort for the negligent hiring of an independent contractor.[96] The Indiana Supreme

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86. *Id.* at 624.

87. *Id.*

88. *Id.*

89. IND. CODE § 34-4-40-3 (1993).

90. IND. CODE § 34-4-40-3 (1993) provides:

> The owner, operator, or person responsible for the operation of a motor vehicle is not liable for loss or damage arising from injuries to or the death of:
> (1) the person's parent;
> (2) the person's spouse;
> (3) the person's child or stepchild;
> (4) the person's brother;
> (5) the person's sister; or
> (6) a hitchhiker;
> resulting from the operation of the motor vehicle while the parent, spouse, child or stepchild, brother, sister or hitchhiker was being transported without payment in or upon the motor vehicle unless the injuries or death are caused by the wanton or willful misconduct of the operator, owner, or person responsible for the operation of the motor vehicle.

91. 639 N.E.2d 370 (Ind. Ct. App. 1994).

92. 647 N.E.2d 387 (Ind. Ct. App. 1995).

93. *Akers*, 639 N.E.2d at 371; *Murphy*, 647 N.E.2d at 389.

94. *Akers*, 639 N.E.2d at 372.

95. *Id.* The *Murphy* court applied the reasoning of *Akers* to come to the same conclusion with regard to half-brothers. *Murphy*, 647 N.E.2d at 389.

96. *See* Bagley v. Insight Communications, 623 N.E.2d 440 (Ind. Ct. App. 1993). For a discussion of the court of appeals decision, see also Wirick & Piscione, *supra* note 54, at 1121-22.

Court clarified this matter in *Bagley v. Insight Communications Co.*[97] The supreme court agreed that other jurisdictions have accepted the theory of negligent hiring of an independent contractor as an independent cause of action and that the *Restatement (Second) of Torts* also recognizes this as a separate tort.[98] However, recognition of an independent cause of action for negligently hiring an independent contractor is not necessary in Indiana.[99] Although Indiana's general rule is that a principal is not liable for the negligence of an independent contractor, five exceptions exist to this general rule.[100] Those exceptions are:

> (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.[101]

The policies and rules found in *Restatement (Second) of Torts*, section 411 are already embodied in the five exceptions to the general rule of non-liability.[102] Therefore, the court found it unnecessary to recognize a separate cause of action for negligent hiring of an independent contractor.

4. Action for Trespass for Discharge of Noxious Substance.—In *Lever Brothers Co. v. Langdoc*,[103] the court held that a business could be liable for negligent trespass when it discharged oil into the sewer system that backed up into an adjacent landowner's basement.[104] The court noted that although no Indiana decision had determined the issue, "other jurisdictions ha[d] determined that a trespass action [would] exist if there [was] a direct causal relation between the conduct of the actor and the intrusion of foreign matter upon the possessor's land causing harm."[105] Applying section 165 of the *Restatement (Second) of Torts*,[106]

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97. 658 N.E.2d 584 (Ind. 1995).

98. *Id.* at 587. Section 411 of the *Restatement (Second) of Torts* states:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

99. *Bagley*, 658 N.E.2d at 587.

100. *Id.* at 586.

101. *Id.* (citing Perry v. Northern Indiana Pub. Serv. Co., 433 N.E.2d 44, 47 (Ind. Ct. App. 1982)).

102. *Id.* at 587.

103. 655 N.E.2d 577 (Ind. Ct. App. 1995).

104. *Id.* at 582.

105. *Id.* (citing Scottish Guarantee Ins. Co. v. Dwyer, 19 F.3d 307, 311 (7th Cir. 1994); Dial v. City of O'Fallon, 411 N.E.2d 217, 220 (Ill. 1980)).

106. Section 165 provides:

> One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is

the court determined that "Lever Brothers' actions prompted foreign matter to enter property possessed by Langdoc causing her property damage; this constitute[d] a negligent trespass."[107]

5. "Public Thoroughfare" Immunity.—The court of appeals clarified the applicability of the immunity provided by Indiana Code section 34-4-16.5-3(3) in the case of *Yerkes v. Heartland Career Center.*[108] Subsection 3 of the immunity section of the Indiana Tort Claims Act immunizes governmental entities and employees for claims arising from losses which result from "[t]he temporary condition of a public thoroughfare which results from weather." After concluding that the defendant, Heartland Career Center, was a school corporation pursuant to the Act and therefore a political subdivision entitled to the protections of the Act, the court addressed the question of whether the loss resulted from the temporary condition of the public thoroughfare due to weather.

In *Yerkes*, the plaintiff filed a negligence action against Heartland for injuries she allegedly received after she slipped and fell on a patch of ice on a sidewalk outside of the career center. Although the plaintiff attempted to argue that the sidewalk was not a public thoroughfare because it was located next to a parking lot rather than a public street, the court concluded that there was no requirement that the sidewalk be adjacent to a public street or within the right-of-way of the public street in order to be considered a thoroughfare.[109] The court further rejected Yerkes' assertion that the sidewalk was not a public sidewalk because it led only to the school. The court stated that sidewalks which provide ingress and egress exclusively to public facilities (such as schools) are public even though not every member of the public uses them.[110] The court specifically concluded "where the entity is public, the sidewalk which serves it is a public thoroughfare."[111]

6. Recreational Use Immunity Statute.—In *Drake v. Mitchell Community Schools*,[112] the Indiana Supreme Court clarified the meaning of the Recreational Use Statute.[113] The Recreational Use Statute provides immunity to landowners who allow their land to be used for recreational purposes.[114] In *Drake*, a bank

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subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or a thing or a third person in whose security the possessor has a legally protected interest.

RESTATEMENT (SECOND) OF TORTS § 165 (1965).

107. *Lever Brothers*, 655 N.E.2d at 582.

108. 661 N.E.2d 558 (Ind. Ct. App. 1995).

109. *Id.* at 561-62.

110. *Id.* at 562.

111. *Id.*

112. 649 N.E.2d 1027 (Ind. 1995).

113. IND. CODE § 14-2-6-3 (1993).

114. The statute provides:

Any person who goes upon or through the premises including, but not as a limitation, lands, caves, waters, and private ways of another with or without permission to hunt, fish, swim, trap, camp, hike, sightsee, or for any other purposes, with or without payment of monetary consideration, or with the payment of monetary consideration

allowed a school to use its silo for a haunted house. One of the students became ill after she contracted histoplasmosis from the dust in the silo.[115] The bank argued that it was immune from liability because the use of the silo constituted a recreational use.[116] The court disagreed. It held that under the rules of statutory construction, the language "for any other purposes" was limited by the language preceding it in the statute. Thus, it only applied to activities similar to hunting, fishing, sightseeing and hiking.[117] Allowing the silo to be used by the students for a haunted house was not the type of recreation contemplated under the statute and the bank was not afforded immunity under it.[118]

7. Parental Failure to Control Child.—In *Wells v. Hickman*,[119] the court of appeals addressed, as a matter of first impression, the issue of whether Indiana common law recognized parental failure to control a child as a basis for a cause of action against the parent. In *Wells*, the plaintiffs' son was killed by the minor child of a neighbor. The plaintiffs then sued the minor's mother and grandparents for negligent failure to control the minor, who had exhibited prior acts of violence. The Indiana Court of Appeals first addressed the issue of whether Indiana Code section 34-4-31-1[120] limited parental liability to $3,000 and precluded recovery for additional damages under a common law negligence theory. After concluding that the statute was in derogation of the common law, which generally held that a parent was not liable for the tortious acts of their minor children, the court concluded that the statute made a parent strictly liable for the knowing, intentional

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directly or indirectly on his behalf by an agency of the state or federal government, is not thereby entitled to any assurance that the premises are safe for such purpose. The owner of such premises does not assume responsibility for nor incur liability for any injury to person or property caused by an act or failure to act of other persons using such premises. The provisions of this section shall not be construed as affecting the existing case law of Indiana of liability of owners or possessors of premises with respect to business invitees in commercial establishments nor to invited guests nor shall this section be construed as to affect the attractive nuisance doctrine. Nothing in this section contained shall excuse the owner or occupant of premises from liability for injury to persons or property caused by the malicious or illegal acts of the owner or occupant.

Id.

115. *Drake*, 649 N.E.2d at 1027.

116. *Id.* at 1029-30.

117. *Id.* at 1030.

118. *Id.*

119. 657 N.E.2d 172 (Ind. Ct. App. 1995).

120. IND. CODE § 34-4-31-1(1) (1993) states in relevant part:

(a) As used in this section, "child" means an unemancipated person who is less than eighteen (18) years of age.

(b) A parent is liable for not more than three thousand dollars ($3,000) in actual damages arising from harm to a person or damage to property knowingly, intentionally, or recklessly caused by the parents' child if: (1) the parent has custody of the child; and (2) the child is living with the parent.

or reckless acts of the parents' minor child.[121]

The court then acknowledged that in addition to this statutory remedy, there were four common law exceptions to the general rule that a parent is not liable for the tortious acts of his or her child.[122] After examining the relationship between the statute creating strict parental liability for certain acts of their minor child and the fact that common law parental liability under any of the four exceptions is based, in some form, upon the negligent act or omission of the parent or the parents' direct control over the child creating the opportunity for the child to create injury, the court concluded that it did not believe the legislature intended to place a $3,000 limit on a parent's liability when it created the strict liability statute.[123] The court of appeals instead concluded that the common law causes of action are separate and distinct from the strict liability claim under the statute, and any damages that may be recovered under the common law exceptions were not limited by the statute. The court of appeals then determined that a parents' liability is not limited to $3,000 when the parent is found to be liable under one of the four common law exceptions.[124] The court of appeals did, however, conclude that any payment under the statute would reduce the damage award received under one of the common law exceptions.[125]

The court then addressed the issue of whether the parent had a duty to control her minor son because she knew or should have known that injury to the plaintiffs' decedent was possible. In addressing this issue, the court of appeals focused on foreseeability, and concluded that a duty attaches where there has been a failure to control and the parent knows or should have known that injury to another was reasonably foreseeable. The court of appeals specifically concluded that the parent, to be liable, must know or should have known that the child had a habit of engaging in the particular act or course of conduct that led to the plaintiff's injury.[126] The court concluded that the critical issue in *Wells* was whether the parent knew or with due care should have known that the child would injure the

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121. *Wells*, 657 N.E.2d at 176.

122. *Id.* (citing K.C. v. A.P., 577 So. 2d 669, 671 (Fla. App. 1991); Ross v. Lowe, 605 N.E.2d 786, 790-91 (Ind. Ct. App. 1992), *vacated on other grounds*, 619 N.E.2d 911 (Ind. 1991)). The court identified these four exceptions:

> 1) where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others; 2) where the child committing the tort is acting as the servant or agent of its parents; 3) where the parents consents, directs, or sanctions the wrongdoing; and 4) where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible.

Id. The plaintiffs' claim in *Wells* proceeded under the fourth common law exception.

123. *Id.* at 177.

124. *Id.*

125. *Id.*

126. *Id.* at 178 (citing *K.C.*, 577 So. 2d at 671; Parsons v. Smithey, 504 P.2d 1272, 1276 (Ariz. 1973)).

specific victim in this case.[127] While the record indicated that the parent knew the child was troubled and could anticipate the same type of conduct he had exhibited in the past, the child's past cruelty to animals and suicidal comment did not make his subsequent killing of a neighborhood friend reasonably foreseeable.[128]

The plaintiff in *Wells* also attempted to extend the common law failure to control exception to the grandparents on the theory that they had assumed parental control over the minor grandchild. The court of appeals refused to expand this common law exception and instead analyzed the case under a negligent entrustment theory. The court concluded that because the minor child was not specifically entrusted to the grandparents' care and, in fact, the grandparents were unaware even of his presence on their property, there was nothing in the relationship between the grandparents and the child that gave rise to a negligent entrustment theory.[129] The court of appeals also rejected the plaintiffs' attempt to invoke a premises liability theory against the grandparents.[130]

8. Unincorporated Associations.—In *McDonald v. Maxwell*,[131] the court of appeals addressed a claim by a church member who was injured when she slipped and fell on the church floor. The church member brought a negligence claim against the church's janitor. The court of appeals found that a genuine issue of material fact existed as to whether the janitor breached a duty of care in waxing the floor, and that this issue precluded summary judgment. Of more significance in this case, however, is the court's footnote discussing the appropriateness of the long existing general rule in Indiana that members of an unincorporated association cannot sue the association for the tortious acts of one or more of its members.[132] Although the court acknowledged the continued viability of this rule, it specifically questioned the appropriateness of this rule as applied to a part-time, non-member employee of the unincorporated association, who, as a result of the rule, was exposed to liability as the sole defendant.

Because the rule was originally adopted as an attempt to prevent collusive suits between members of the association, the court concluded that "it may be time to take another look at the rule and particularly the rule's impact on the employees of unincorporated associations and injured plaintiffs."[133] Because the issue was not raised during the appeal, however, the court simply left such a possible determination for another date. This dicta, however, must certainly give pause to any practitioner who must rely on the applicability of this rule to defend an unincorporated association against a negligence suit brought by a member,

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127. *Id.*

128. *Id.* It was particularly significant to the court that the two minors had played together previously without incident and there were no indicators of any intent to harm the decedent. The court then concluded as a matter of law that the parent had no duty to control the child because the harm subsequently done to the victim was not reasonably foreseeable. *Id.* at 179.

129. *Id.*

130. *Id.* at 179-80.

131. 655 N.E.2d 1249 (Ind. Ct. App. 1995).

132. *Id.* at 1251 n.1.

133. *Id.* at 1251.

particularly where an employee of the association is intentionally given a disproportionate share of liability. An additional issue in this regard would be the ability of an employee defendant to name the unincorporated association as a nonparty. Under the recent amendments to the Comparative Fault Act, naming the unincorporated association as a nonparty would be allowed, although under prior case law, the association could not be named as a nonparty because it could not be named as a defendant.[134]

9. Other Cases of Note.—

a. Nobles v. Cartwright.[135]—The Indiana Court of Appeals discussed the four theories recognized under Indiana law as the tort of public disclosure of private facts.

b. Frye v. Rumbletown Free Methodist Church.[136]—The Indiana Court of Appeals heard the appeal of a plaintiff who had sued the defendant church after he sustained injuries from a fall on the steps of the church's parsonage. The plaintiff's vehicle had stalled on a nearby highway, and the man approached the parsonage for help because it was the nearest residence. In reversing the trial court's grant of summary judgment, the court of appeals declined to characterize the plaintiff's status as either a public invitee or a trespasser. Instead, the court concluded, in a matter of first impression in Indiana, that the stranded motorist was a licensee because he had the implied privilege of entering the land as a matter of general or local custom. The court relied heavily on the *Restatement (Second) of Torts*, section 330 in reaching this conclusion, which created a duty on the part of the church to warn of latent or hidden dangers. The court's conclusion in this case may well cause a dramatic reduction in the number of plaintiffs classified as trespassers in premises liability actions and practitioners should be aware of this significant holding.

c. State v. Eaton.[137]—The Indiana Court of Appeals determined that the $300,000.00 governmental liability limitation of Indiana Code section 34-4-16.5-4 "for injury to or death of one (1) person in any one occurrence" did not preclude a separate recovery to the parents in a case brought for the wrongful injury of a minor for loss of services. The court concluded that because there were two separate causes of action, each cause of action involved a separate injury as defined by Indiana Code section 34-4-16.5-4, thus giving rise to a separate $300,000.00 cap.[138]

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134. *See* IND. CODE § 34-4-33-2(a) (1993); Templin v. Fobes, 617 N.E.2d 541, 544 (Ind. 1993); Cornell Harbison Excavating, Inc. v. May, 546 N.E.2d 1186, 1187 (Ind. 1989).

135. 659 N.E.2d 1064 (Ind. Ct. App. 1995).

136. 657 N.E.2d 745 (Ind. Ct. App. 1995).

137. 659 N.E.2d 232 (Ind. Ct. App. 1995).

138. *Id.* at 237.

APPENDIX

[new text appears in **bold**, deleted text not included]

SECTION 1. IC 33-1-1.5-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 1. This chapter governs all actions **brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought.**

SECTION 2. IC 33-1-1.5-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 2. As used in this chapter:

(1) "User or consumer" means a purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

(2) "Physical harm" means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage.

(3) "Manufacturer" means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer. For purposes of this chapter, "manufacturer" includes a seller who:

(A) has actual knowledge of a defect in a product;

(B) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;

(C) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer;

(D) is owned in whole or significant part by the manufacturer; or

(E) owns in whole or significant part the manufacturer.

A seller who discloses the name of the actual manufacturer of a product is not a manufacturer under this section merely because the seller places or has placed a private label on a product.

(4) "Product liability action" means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of physical harm.

(5) "Seller" means a person engaged in **the** business **of selling or leasing a product for resale, use, or consumption.**

(6) "Product" means any item or good that is personalty at the time it is

conveyed by the seller to another party. It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.

(7) "Unreasonably dangerous" refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.

SECTION 3. IC 33-1-1.5-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 3. (a) **Except as provided in subsection (c), a person** who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to **the user's or consumer's** property is subject to liability for physical harm caused by that product to the user or consumer or to **the user's or consumer's** property if that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if:

(1) the seller is engaged in the business of selling such a product; and

(2) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which it is sold by the person sought to be held liable under this chapter.

(b) The rule stated in subsection (a) applies although:

(1) the seller has exercised all reasonable care in the **manufacture and** preparation of **the** product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

However, in any action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.

(c) A product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against any seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.

(d) Nothing in this chapter shall be construed to limit any other action from being brought against any seller of a product. If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this section, the manufacturer of the product.

SECTION 4. IC 33-1-1.5-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 4. (a) The defenses in this section are

defenses to **an action brought under this chapter.** The burden of proof of any defense raised in **an** action **under this chapter** is on the party raising the defense.

(b) With respect to any action **brought under this chapter:**

(1) It is a defense that the user or consumer bringing the action knew of the defect and was aware of the danger **in the product** and nevertheless proceeded to make use of the product and was injured.

(2) It is a defense that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.

(3) It is a defense that a cause of the physical harm is a modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm where such modification or alteration is not reasonably expectable to the seller.

SECTION 5. IC 33-1-1.5-4.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 4.5. In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:**

(1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or

(2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

SECTION 6. IC 33-1-1.5-9 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 9. In a product liability action where liability is assessed against more than one (1) defendant, a defendant is not liable for more than the amount of fault, as determined under section 10 of this chapter, directly attributable to that defendant. A defendant in a product liability action may not be held jointly liable for damages attributable to the fault of another defendant.**

SECTION 7. IC 33-1-1.5-10 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 10. (a) As used in this chapter, "fault" means an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:**

(1) Unreasonable failure to avoid an injury or to mitigate damages.

(2) A finding under IC 33-1-1.5-3 that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

(b) In a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with IC 34-4-33-5.
(c) In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.

SECTION 8. IC 34-4-33-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 2. (a) As used in this chapter:

(1) "Fault" includes any act or omission that is negligent, willful, wanton, reckless, **or intentional** toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

(2) "Nonparty" means a person who **caused or contributed to cause the alleged injury, death, or damage to property** but who has not been joined in the action as a defendant.

(b) For purposes of sections 4 and 5 of this chapter, a defendant may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon **the defendant's** own alleged act or omission but upon **the defendant's** relationship to the other defendant.

SECTION 9. IC 34-4-33-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 5. (a) In an action based on fault that is brought against one (1) defendant or two (2) or more defendants who may be treated as a single party, and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. **The jury may not be informed of any immunity defense that is available to a nonparty. In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property, tangible or intangible, regardless of whether the person was or could have been named as a party.** The percentage of fault of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of the defendant by the amount of damages determined under subdivision (3) and shall then enter a verdict for the claimant in the amount of the product of that multiplication.

(b) In an action based on fault that is brought against two (2) or more defendants, and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. **The jury may not be informed of any immunity defense that might be available to a nonparty. In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property, tangible or intangible, regardless of whether the person was or could have been named as a party.** The percentage of fault of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

(c) In an action based on fault that is tried by the court without a jury, the court shall make its award of damages according to the principles specified in subsections (a) and (b) for juries.

(d) In the case of an intentional tort, the plaintiff may recover one hundred percent (100%) of the compensatory damages in a civil action for intentional tort from a defendant who was convicted after a prosecution based on the same evidence.

SECTION 10. IC 34-4-34-3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 3. A jury in a case subject to this chapter may not be advised of:**

(1) the limitation on the amount of a punitive damage award under section 4 of this chapter; or

(2) the requirement under section 6 of this chapter concerning allocation of money received in payment of a punitive damage award.

SECTION 11. IC 34-4-34-4 IS ADDED TO THE INDIANA CODE AS A

NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 4. A punitive damage award may not be more than the greater of:**

(1) three (3) times the amount of compensatory damages awarded in the action; or

(2) fifty thousand dollars ($50,000).

SECTION 12. IC 34-4-34-5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 5. If a trier of fact awards punitive damages that exceed the limitation under section 4 of this chapter, the court shall reduce the punitive damage award to not more than the greater of:**

(1) three (3) times the amount of compensatory damages awarded in the action; or

(2) fifty thousand dollars ($50,000).

SECTION 13. IC 34-4-34-6 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 6. (a) Except as provided in IC 13-7-8.7-10, when a judgment that includes a punitive damage award is entered in a civil action, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.**

(b) Upon receiving the payment described in subsection (a), the clerk of the court shall:

(1) pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and

(2) pay the remaining seventy-five percent (75%) of the punitive damage award to the treasurer of the state, who shall deposit the funds into the violent crime victims compensation fund established by IC 5-2-6.1-40.

SECTION 14. IC 34-4-44.6 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]:

Chapter 44.6 Offers of Settlement

Sec. 1. This chapter applies only to actions in tort brought under title 33 and this title, and does not apply to small claims actions.

Sec. 2. As used in this chapter, "offeror" means a party to a civil action who makes a qualified settlement offer to a recipient who is an opposing party in the civil action.

Sec. 3. As used in this chapter, "recipient" means a party to a civil action who receives a qualified settlement offer from an offeror who is an opposing party in the civil action.

Sec. 4. As used in this chapter, "qualified settlement offer" means an offer of full and final settlement to resolve all claims and defenses at issue between the offeror and the recipient.

Sec. 5. A qualified settlement offer may be made at any time after a complaint has been filed in a civil action, but may not be made less than thirty (30) days before a trial of the action.

Sec. 6. A qualified settlement offer must resolve all claims and

defenses at issue in the civil action between the offeror and the recipient before the qualified settlement offer may be accepted by the recipient.

Sec. 7. A qualified settlement offer must:

(1) be in writing;

(2) be signed by the offeror or the offeror's attorney of record;

(3) be designated on its face as a qualified settlement offer;

(4) be delivered to each recipient or recipient's attorney of record by registered or certified mail or by any method that verifies the date of receipt;

(5) set forth the complete terms of the settlement proposed by the offeror to the recipient in sufficient detail to allow the recipient to decide whether to accept or reject it;

(6) include the name and address of the offeror and the offeror's attorney of record, if any; and

(7) expressly revoke all prior qualified settlement offers made by the offeror to the recipient.

Sec. 8. An acceptance of a qualified settlement offer must be:

(1) unconditional;

(2) in writing;

(3) signed by the accepting recipient or the accepting recipient's attorney of record; and

(4) delivered:

(A) by registered or certified mail or by a means that verifies the date of receipt to the offeror or the offeror's attorney of record; and

(B) not more than thirty (30) days after the recipient receives the qualified settlement offer.

Sec. 9. (a) If a recipient does not accept a qualified settlement offer and the final judgment is less favorable to the recipient than the terms of the qualified settlement offer, the court shall award attorney's fees, costs, and expenses to the offeror upon the offeror's motion.

(b) An award of attorney's fees, costs, and expenses under this section shall consist of attorney's fees at a rate of not more than one hundred dollars ($100) per hour and other costs and expenses incurred by the offeror after the date of the qualified settlement offer. However, the award of attorney's fees, costs, and expenses may not total more than one thousand dollars ($1,000).

(c) A motion for an award of attorney's fees, costs, and expenses under this section must be filed not more than thirty (30) days after entry of judgment. The motion must be accompanied by an affidavit of the offeror or the offeror's attorney establishing the amount of the attorney's fees and other costs and expenses incurred by the offeror after the date of the qualified settlement offer, constituting prima facie proof of the reasonableness of the amount.

(d) Where appropriate, the court may order a judgment entered against the offeror and in favor of the recipient reduced by the amount of attorney's fees, costs, and expenses awarded to the offeror under this

section.

SECTION 15. IC 34-4-33-13 IS REPEALED [EFFECTIVE JULY 1, 1995].

SECTION 16. [EFFECTIVE JULY 1, 1995] **IC 33-1-1.5-4.5, IC 33-1-1.5-9, IC 33-1-1.5-10, IC 34-4-34-3, IC 34-4-34-4, IC 34-4-34-5, IC 34-4-34-6, and IC 34-4-44.6, all as added by this act, apply to a cause of action that accrues after June 30, 1995.**

1995 SURVEY OF INDIANA COMMERCIAL CODE

DIANE RAE HURTT*

INTRODUCTION

In 1995 there were few decisions involving the Uniform Commercial Code as adopted in Indiana. This Article will survey those opinions. In addition, this Article includes a discussion of several decisions by the Seventh Circuit Court of Appeals examining the UCC adopted by other states. These cases address issues relating to the scope of a security interest, contract modification, the scope of setoff, indemnification for a breach of warranty claim, and an arbitration clause in a battle of the forms.

I. CHANGES AT HOME: CASES AFFECTING INDIANA'S UCC

A. Kimco Leasing, Inc. v. State Board of Tax Commissioners: True Lease or Disguised Security Interest

Whether a transaction is governed by Article 9 as a security interest is determined by the substance of the instrument, not its form. Section 26-1-9-102(1)(a) of the Indiana Code states that Article 9 applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property . . . ."[1] In *Kimco Leasing, Inc. v. State Board of Tax Commissioners*, the tax court examined the issue of whether Kimco was the "owner" of leased equipment for the purpose of assessing taxes.[2] To make this determination, the court first considered the threshold issue of whether Kimco's leases were true leases or disguised security interests.[3] Kimco purchased equipment from suppliers and leased the equipment to third parties under contracts titled "Equipment Lease Agreements."[4] In 1991, the State Board of Tax Commissioners audited Kimco and assessed it taxes as the "owner" of unreported leased equipment.[5] Kimco challenged the assessment arguing that it was not the "owner" of the leased equipment but rather the holder of a security interest.[6]

In deciding the threshold issue, the court looked to the definition of a security interest in the Indiana Code and to case law for guidance.[7] The subject leases were written both before and after July 1, 1991, the effective date of the amended

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1. IND. CODE § 26-1-9-102(1)(a) (1993).
2. 656 N.E.2d 1208, 1211 (Ind. T.C. 1995) [hereinafter *Kimco II*].
3. *Id.* at 1214.
4. *Id.* at 1211. In Kimco Leasing, Inc. v. State Bd. of Tax Comm'rs, 622 N.E.2d 590, 592 (Ind. T.C. 1993) [hereinafter *Kimco I*], the Tax Court of Indiana had previously addressed the issue of whether Kimco's leases were true leases or disguised security interests.
5. *Kimco II*, 656 N.E.2d at 1211.
6. *Id.* at 1212.
7. *Id.* at 1214.

definition of security interest in the Indiana Code.[8] Before it was amended, the definition provided that "[w]hether a lease is intended as a security interest is determined by the facts of each case."[9] The tax court applied both the "nominal consideration" test and the "economic realities" test to Kimco's leases written before July 1, 1991.[10]

Under the nominal consideration test, if the purchase option price in the lease is nominal relative to the fair market value of the property at the time the option is exercised, the lease is a security interest as a matter of law.[11] Kimco argued that the purchase option price was ten percent of the price paid by Kimco to purchase the equipment.[12] Further, the purchase option was exercised at the beginning of the lease and the fair market value of the equipment was the purchase price paid by Kimco.[13] Consequently, the purchase option price was nominal relative to the fair market value of the equipment when the option was exercised.[14] The court did not accept Kimco's argument.[15] It explained that Kimco's lease provides: "At the completion of this Lease the Equipment may be purchased for _____ (purchase option)."[16] "The word 'completion' is defined as the 'act of becoming complete' and the word 'complete' is defined as 'to end after satisfying all demands or requirements.'"[17] Consequently, the plain meaning of the words in Kimco's leases revealed that the purchase options arose at the end, not the beginning, of the leases.[18] The court noted that Kimco did not provide evidence of the fair market value of the equipment at the end of the lease and as a result the court could not compare the anticipated fair market value of the equipment at the time the option was to be exercised and the purchase option price.[19] This meant that the court could not determine whether the additional consideration was nominal, therefore, it concluded that Kimco did not satisfy the nominal consideration test.

The economic realities test evaluates the relationship between the purchase option price and the list price.[20] "A purchase option price of less than twenty-five

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8. *Id.*

9. IND. CODE § 26-1-1-201(37) (repealed July 1, 1991).

10. *Kimco II*, 656 N.E.2d at 1214. In *Kimco I* the court found that the leases did not satisfy either test. Kimco Leasing, Inc. v. State Bd. of Tax Comm'rs, 622 N.E.2d 590, 593-94 (Ind. T.C. 1993).

11. *Kimco II*, 656 N.E.2d at 1214. In *Kimco I*, there was no evidence of the fair market value of the equipment at the time the purchase option was to be exercised. Consequently, the court could not determine "whether the purchase option [was] nominal as a matter of law." *Kimco I*, 622 N.E.2d at 593.

12. *Kimco II*, 656 N.E.2d at 1214.

13. *Id.*

14. *Id.*

15. *Id.* at 1215.

16. *Id.* (quoting the Equipment Agreement).

17. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 465 (1981)).

18. *Id.*

19. *Id.*

20. *Id.* (citing Kimco Leasing, Inc. v. State Bd. of Tax Comm'rs, 622 N.E.2d 590, 593-94

percent (25%) of the . . . list price constitutes evidence of a security interest." [21] Kimco argued that although the list price was not stated on the lease it could be easily established.[22] It explained that the line below the amount of the security deposit read, "10% Net Cost (Security Deposit)."[23] Therefore, the list price could be determined by multiplying the amount of the security deposit by ten.[24] Upon reviewing Kimco's lease form, the court concluded that the list price could not be ascertained by using such a method and held that Kimco failed to satisfy the economic realities test.[25]

The leases written by Kimco after July 1, 1991 were governed by the amended definition of "security interest" which reads as follows:

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. . . . Whether a transaction creates a lease or security interest is determined by the facts of each case. However, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee and:
>
> (a) the original term of the lease is equal to or greater than the remaining economic life of the goods;
>
> (b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
>
> (c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or
>
> (d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.
>
> A transaction does not create a security interest merely because it provides that:
>
> (a) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;
>
> (b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods;
>
> (c) the lessee has an option to renew the lease or to become the owner

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(Ind. T.C. 1993)).

21. *Id.*
22. *Id.* at 1215-16.
23. *Id.*
24. *Id.* at 1215.
25. *Id.* at 1216.

> of the goods;
> (d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market value rent for the use of the goods for the term of the renewal at the time the option is be performed; or
> (e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.[26]

The *Kimco* court identified two tests for determining whether a lease is a true lease or a security interest, which it characterized as the "bright line" test and the "meaningful residual test."[27] Under the bright line test "a lease creates a security interest as a matter of law if: 1) the lessee is obligated to perform for the full length of the lease without being able to voluntarily terminate it, and 2) one of [the] four enumerated terms are present."[28] The court found that Kimco's lessees were not able to terminate their leases before the end of the lease.[29] Hence, Kimco's leases satisfied the first part of the test.[30]

The court then considered whether Kimco's leases met one of the four term requirements.[31] The first requires that the "original term of the lease is equal to or greater than the remaining economic life of the goods."[32] The court noted that Kimco's evidence indicated that typically the initial term of Kimco's leases was shorter than the remaining economic life of the leased equipment. Consequently, Kimco's leases did not satisfy the first term requirement.[33] The second requirement mandates that "the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods." The third requirement provides that "the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement."[34] The court found that Kimco's leases did not include an obligation or option to renew the lease or to become the owner of the leased equipment. Thus, it concluded that Kimco's leases did not satisfy the second or third term requirements.[35] The fourth requirement states that "the lessee must have an option to become the owner of the goods for no additional consideration or nominal

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26. *Id.* at 1217 (quoting IND. CODE § 26-1-1-201(37) (1993)).
27. *Id.* at 1218-19.
28. *Id.* at 1217 (quoting IND. CODE § 26-1-1-201(37) (1993)).
29. *Id.*
30. *Id.*
31. *Id.*
32. IND. CODE § 26-1-1-207(37) (1993).
33. *Kimco II*, 656 N.E.2d at 1218.
34. IND. CODE § 26-1-1-207(37) (1993).
35. *Kimco II*, 656 N.E.2d at 1218.

additional consideration upon compliance with the lease agreement."[36] To determine whether the additional consideration is nominal, the definition of security interest instructs that "[a]dditional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised."[37] In *Kimco*, the court held that because Kimco did not meet this nominal consideration test, its leases were not security interests under the bright line test.[38]

After the court concluded that Kimco's leases did not satisfy the bright line test, it then considered the meaningful residual test. Under the meaningful residual test, a court must determine whether the lessor retains a meaningful residual interest at the end of the lease in the property.[39] If the lessor retains a meaningful residual interest, the lease is a true lease.[40] To make this determination, a court will consider whether the lease contains an option to purchase the property for nominal or no consideration and whether the lessee acquires equity in the property so that the only sensible decision for the lessee is to exercise the option to purchase.[41] In *Kimco*, the court held that because Kimco did not provide evidence of the anticipated fair market value of the leased equipment at the time the option was to be exercised, it could not determine whether Kimco maintained a meaningful residual interest.[42] The court concluded that Kimco's leases were true leases and not security interests. Thus, Kimco was the owner of the equipment and was taxed accordingly.

B. Wilson Fertilizer & Grain, Inc. v. ADM Milling Co.: Additional Terms in a Battle of the Forms

Wilson Fertilizer & Grain, Inc. v. ADM Milling Co.[43] involved a dispute arising out of a battle of the forms. Wilson Fertilizer & Grain, Inc. ("Wilson") shipped grain to ADM Milling Co. ("ADM") pursuant to a contract between the parties. A broker facilitated the transaction and sent each party a confirmation of trade. The confirmation did not include an arbitration provision. In addition, ADM sent a purchase confirmation to Wilson that contained a provision stating that the contract was subject to the Trade Rules of the National Grain and Feed Association. Wilson did not object or respond to ADM's purchase confirmation.[44]

A dispute under the contract arose between the parties and Wilson filed suit against ADM.[45] ADM filed a motion to dismiss the suit claiming that the Trade

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. 654 N.E.2d 848 (Ind. Ct. App. 1995).
44. *Id.* at 849.
45. *Id.*

Rules of the National Grain and Feed Association required the parties to arbitrate the dispute.[46] Wilson argued that the arbitration provisions were not part of its contract with ADM.[47] The trial court granted ADM's motion to dismiss and Wilson appealed.[48]

The court instructed that a party seeking to compel arbitration must satisfy a two-prong test.[49] First, that party must prove there was an enforceable contract to arbitrate the dispute.[50] Second, that party must show that the disputed matter was the type of matter the parties would have agreed to arbitrate.[51] In *Wilson Fertilizer*, the second prong was not in dispute. The issue before the court was whether the additional terms were part of the contract between Wilson and ADM.[52]

Whether the additional terms were part of the contract was governed by Indiana Code section 26-1-2-207 which provides in relevant part that, between merchants, additional terms become part of the contract unless they "materially alter" the agreement of the parties.[53] The test for whether the additional terms materially altered the contract is whether "incorporation into the contract without express awareness by the other party would result in surprise or hardship."[54]

Wilson argued that the arbitration provision materially altered the contract as a matter of law.[55] ADM contended that, as a matter of law, the additional provisions providing for arbitration did not materially alter the agreement.[56] The

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* IND. CODE § 26-1-2-207 (1993) reads as follows:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

The parties agreed that a contract had been formed, the disputed provisions were additional terms to the contract and they were merchants. The only question was whether the additional terms materially altered the contract. *Wilson Fertilizer*, 654 N.E.2d at 850.

54. *Wilson Fertilizer*, 654 N.E.2d at 850 (quoting Maxon Corp. v. Tyler Pipe Indus., Inc., 497 N.E.2d 570, 576 (Ind. Ct. App. 1986)).

55. *Id.*
56. *Id.*

court rejected both parties' arguments and held that whether the arbitration clause materially altered the contract was a question of fact to be decided on a case by case basis.[57]

Turning to the facts, Wilson argued that the arbitration provision caused Wilson hardship because the rules of arbitration provided that Wilson must file a complaint against ADM within one year which was significantly less than the six year statute of limitations under Indiana law.[58] Wilson argued that it suffered hardship because it was now time barred under the arbitration provision to file another complaint against ADM.[59] The court disagreed for two reasons. First, the court explained that the UCC permitted parties to contractually reduce the time in which to bring a claim. Second, the court noted that Wilson had filed its original complaint within the one year time limit after the contract was formed.[60] Because Wilson made a timely filing of its original complaint, the court was unable to see how a contract provision requiring Wilson to submit its claim for arbitration within one year imposed a hardship.[61]

Wilson also argued that the additional provision caused surprise. The arbitration provision was not expressly stated in the confirmation. Instead, it was incorporated by reference to the trade rules which included arbitration provisions.[62] The trade rules were not provided with the confirmation, and Wilson was not familiar with them. Consequently, Wilson argued that the addition of the arbitration provision resulted in surprise.[63] ADM counterargued that because Wilson was not familiar with the rules it should have objected to the additional provision or at least inquired about the rules.[64] The court was unpersuaded by Wilson's argument and held that the additional provisions in the purchase confirmation did not materially alter the agreement between the parties.[65]

II. Decisions by the Seventh Circuit Court of Appeals

A. American Suzuki Motor Corp. v. Bill Kummer, Inc.: When an Attempted Modification is a Waiver

In *American Suzuki Motor Corp. v. Bill Kummer, Inc.*,[66] Bill Kummer, Inc. ("Kummer") entered into an Authorized Suzuki Motorcycle Dealer Agreement ("Dealer Agreement") with American Suzuki Motor Corp. ("Suzuki") in 1986. The Dealer Agreement authorized Kummer to purchase motorcycles, parts, and

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57. *Id.* at 850-51.
58. *Id.* at 852.
59. *Id.*
60. *Id.* at 853.
61. *Id.*
62. *Id.*
63. *Id.* at 854-55.
64. *Id.* at 855.
65. *Id.*
66. 65 F.3d 1381, 1383-84 (7th Cir. 1995).

accessories for resale. In turn, Kummer agreed to use its best efforts to sell Suzuki products. The agreement further provided that any modification must have been in writing. In late 1988, Suzuki notified Kummer that it would terminate the Dealer Agreement in sixty days. Kummer filed a complaint with the Office of the Commissioner of Transportation of Wisconsin ("OCT") under the Motor Vehicle Dealer Law challenging the proposed termination. By filing the complaint, Kummer triggered the automatic stay provision that required the Dealer Agreement to remain in effect until the OCT issued a final decision.

The OCT did not issue its final decision until January 1993 finding that Suzuki had wrongfully terminated the Dealer Agreement with Kummer. After OCT issued its decision, Suzuki gave notice of the termination of Kummer as a distributor, this time for not stocking and selling Suzuki products while Kummer's complaint with the OCT was pending. (During the automatic stay period, Kummer did not order any motorcycles and sold the last one in stock by August 1990. Suzuki also failed to visit Kummer's store.) In addition, Suzuki filed a complaint in federal court alleging that Kummer breached the Dealer Agreement. Kummer filed another complaint with the OCT and counterclaimed alleging in part that Suzuki breached the Dealer Agreement.[67]

After a trial before a magistrate, the court found that neither party had breached the Dealer Agreement because "the parties had mutually abandoned or modified their agreement, allowing a cessation from an active dealership agreement."[68] Both parties appealed.[69]

Suzuki asserted that the magistrate erred in finding that the parties had modified the Dealer Agreement.[70] It argued that the Dealer Agreement provided that any modification was to be in writing and section 2-209(2) of the Code adopted by Wisconsin provided that "'[a] signed agreement which excluded modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . . .'"[71] Because there was no written modification, the Dealer Agreement was not modified.[72] The court pointed out an exception to this rule in section 2-209(4).[73] This section states that an attempt to modify a contract which does not meet the contractual requirement can operate as a waiver.[74] For an attempted modification to act as a waiver, the party seeking to enforce it must have reasonably relied on the modification.[75] The waiver may occur by conduct or words, although the conduct must be unequivocal in character under Wisconsin law.[76] Kummer argued that the parties' conduct constituted an attempted

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67. *Id.* at 1384.
68. *Id.* at 1385.
69. *Id.* at 1384.
70. *Id.* at 1385.
71. *Id.* (quoting WIS. STAT. § 402.209(2)).
72. *Id.* at 1386.
73. *Id.*
74. *Id.*
75. *Id.* at 1384.
76. *Id.* at 1386.

modification of the Dealer Agreement to allow nonperformance during the automatic stay and the attempted modification operated as a waiver of the requirement in the Dealer Agreement that modifications be in writing.[77]

The magistrate's decision was based on Suzuki's express desire to terminate the Dealer Agreement, the failure of Suzuki representatives to visit Kummer's store, and the parties' failure to agree on a minimum volume of sales.[78] In its de novo review, the court of appeals found clear error stating that "none of the conduct relied on by the court indicate[d] that Suzuki and Kummer had agreed [on] . . . Kummer's nonperformance" while the complaint to OCT was pending.[79] Thus, the parties conduct did not operate as a waiver to effectively modifying the contract, and the court of appeals concluded that Kummer had breached the Dealer Agreement

B. ECHO, Inc. v. The Whitson Company, Inc.: The Right of Setoff

In *Echo, Inc. v. The Whitson Company, Inc.*,[80] The Whitson Company, Inc. ("PTC") entered into a distributorship agreement with ECHO which provided that PTC would promote sales of ECHO products in Tennessee. PTC purchased products using purchase orders and accepted the goods. Subsequently, ECHO notified PTC of its intent to terminate the distributorship agreement. PTC was unsuccessful in challenging the termination of the agreement. Following the termination, PTC admitted owing ECHO $93,417.21.[81]

ECHO brought suit to collect the principal due. PTC filed an answer, setoff, and counterclaim alleging wrongful termination of the distributorship agreement. PTC refused to pay its admitted debt claiming a right of setoff under ILCS 5/2-717 for damages arising out of ECHO's wrongful termination of the distributorship agreement.[82] The trial court granted ECHO's motion for summary judgment and entered final judgment ordering PTC to pay the principal due with interest. PTC appealed.[83]

Section ILCS 5/2-717 provides that upon notice to the seller, the buyer "may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the *same contract.*"[84] On appeal, PTC argued that each party's claim arose out of the same contract. Therefore, it should not be required to pay the judgment until the court decided PTC's counterclaim. This would allow PTC to setoff its debt to ECHO against any damages awarded for the counterclaim.[85]

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77. *Id.*
78. *Id.* at 1387.
79. *Id.* at 1386.
80. 52 F.3d 702 (7th Cir. 1995).
81. *Id.* at 703-04.
82. *Id.* at 703.
83. *Id.* at 704.
84. *Id.* at 705.
85. *Id.* at 704.

The issue before the court was whether the contract PTC allegedly breached, the distributorship agreement, and the contract under which PTC owed money to ECHO, a purchase order pursuant to the distributorship agreement, were the same agreement.[86] The court noted that as a general rule under Illinois law applying section 2-717 of the Code, a distributorship agreement and the purchase orders arising under that agreement were different contracts.[87] However, the parties to a contract were allowed to expand their rights of setoff.[88] PTC argued that two provisions in the distributorship agreement expanded the parties rights to setoff to include violations of the agreement.[89]

The Seventh Circuit rejected PTC's argument. It interpreted paragraph 5.1 of the agreement very narrowly, explaining:

> Only in instances where the parties use conflicting forms, or where a purchase order conflicts with the distributorship agreement does paragraph 5.1 apply. And when paragraph 5.1 does apply, it impacts the purchase order only to the extent that it designates what language controls. Paragraph 5.1 unambiguously does not provide PTC with greater rights to set-off because it does not make the distributorship agreement part of every purchase order.[90]

The court also found that paragraph 9.4 did not expand PTC's right of setoff

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86. *Id.* at 705.

87. *Id.* at 705-06.

88. *Id.* at 706.

89. *Id.* The clauses read as follows (ECHO is the Company and PTC is the Distributor):

> 5.1 Purchase Orders. Concurrently with the execution of this agreement, Distributor shall submit to Company its purchase orders for the first shipment of Products. All purchase orders of Distributor shall, unless otherwise agreed by Company from time to time, set forth the quantity of the Products desired, the specification therefor, the desired delivery date, the price of each Product, and all other relevant information necessary to effectuate shipment of the Products by Company. It is contemplated that from time to time purchase orders, in forms prepared by Distributor or other purchasers, may be used in ordering products and that there may be included in such forms certain stipulations, conditions or agreements not otherwise contained herein. **It is expressly understood and agreed that the provisions of this Agreement shall be deemed a part of each purchase order which shall be inconsistent or contrary to the provisions of the Agreement shall be deemed amended or deleted as the case may be [sic].** Specifically, all provisions on the backside of said purchase order shall be deemed deleted or superseded by the provisions of this Agreement.
>
> 9.4 Entire Agreement. This Agreement, together with all attachments hereto and all purchase orders issued hereunder constitutes the entire agreement between the parties and supersedes any and all previous agreements, memoranda, or other understandings of the parties. This agreement may be amended only in writing.

Id.

90. *Id.* at 706-07.

reasoning that the language was not fairly interpreted to unify the purchase orders with the distributorship agreement.[91] Consequently, PTC was not able to setoff its admitted debt to ECHO.

C. Hydrite Chemical Co. v. Calumet Lubricants Co.: Indemnification in a Breach of Warranty Action

In *Hydrite Chemical Co. v. Calumet Lubricants Co.*,[92] Hydrite Chemical Co. ("Hydrite") purchased white mineral oil from Calumet Lubricants Co. ("Calumet") and then resold it to George A. Hormel Company ("Hormel"). The oil was applied to the machinery used to make Spam. Hormel claimed that the oil made the Spam stink. As a result, Hormel removed millions of pounds of Spam from the market, and sued Hydrite on a breach of warranty theory. Hydrite settled with Hormel for $2.25 million dollars. After it had settled the case with Hormel, Hydrite sued Calumet on its own behalf and as Hormel's assignee.

The judge bifuricated the liability and damages phases of the trial. In the liability phase, the jury found that Calumet had breached its warranty that the oil was suitable for use involving incidental contact with food products, and that the breach caused damage to Hydrite but not to Hormel.[93] In the damages phase, the judge ruled that Hydrite could not mention its settlement with Hormel in the opening statement. After the trial began, the judge reversed himself. When Hydrite attempted to introduce evidence relating to its settlement with Hormel, the judge ruled the evidence was inadmissible as hearsay as well as confusing and redundant.[94] The jury awarded Hydrite $30,000 for increased cost and management time, $43,000 for lost profits and $128,000 for settlement and related expenses. The judge set aside the $128,000 reasoning that because the jury did not award Hydrite any of the settlement, it was precluded from an award for expenses incidental to the settlement.[95]

Hydrite sought a new trial for damages on the grounds that the judge did not ameliorate the negative consequence of refusing to permit Hydrite to mention its settlement with Hormel in the opening statement and for not admitting evidence offered on the amount and rationale of Hormel's settlement demands.[96] Calumet cross-appealed arguing that Hydrite did not have an actionable breach of warranty claim because it should have inspected the oil upon delivery, discovered the bad smell, and rejected the oil. Had that been done, Hormel would not have incurred the loss for which Hydrite sought indemnification.[97]

The court of appeals noted that the proceeding was marred by a number of procedural errors including Hydrite's failure to bring Calumet into the law suit as

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91. *Id.* at 707.
92. 47 F.3d 887 (7th Cir. 1995).
93. *Id.* at 889.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 890.

a third party defendant. The court pointed out that this procedure was authorized by Rule 14(a) of the Federal Rules of Civil Procedure as well as section 2-607(5)(a) of the UCC. The court also noted that had Calumet been a party to the suit, the question of whether the settlement was reasonable would not have been an issue. Hormel would, therefore, not have assigned its claim to Hydrite which resulted in the confusing situation in which the jury was required to decide both Hydrite's own claims as well as those assigned from Hormel.[98] The court discussed the other procedural problems and held that any errors by the trial court were not reversible error.[99]

Turning to Calumet's cross appeal, the court instructed that under section 2-607(3)(a) of the Code a buyer who accepts goods which do not conform to the specifications in the contract forfeits his remedies against the seller unless the buyer notifies the seller of the breach within a reasonable time "after he discovers or should have discovered" the nonconformity.[100] Whether Hydrite should have discovered the defect in the oil depended on the language of the parties' contract and usage of trade incorporated by implication.[101] This was a question of fact that the jury resolved against Calumet. Further, the court noted that the contract was oral and the duty of inspection was unclear. For these reasons, the court refused to disturb the jury verdict.[102]

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98. *Id.*
99. *Id.* at 890-93.
100. *Id.* at 893 (quoting UCC §2-607(3)(a)).
101. *Id.*
102. *Id.*

1995 DEVELOPMENTS IN WORKER'S COMPENSATION

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INTRODUCTION

This Article surveys the developments in Indiana's Worker's Compensation law during 1995. The Article reviews a wide variety of cases and issues affecting Indiana practitioners. Areas of special significance include the apportionment statute's definition of disability, the statute of limitations for modifications of awards, and challenges to the Worker's Compensation Act's exclusive remedy.

I. IN THE COURSE OF AND ARISING OUT OF

A. Construction Management & Design, Inc. v. Vanderweele

"To recover under the Act, a claimant must establish that an injury or death occurred 'by accident arising out of and in the course of employment.'"[1] In *Construction Management & Design, Inc. v. Vanderweele,*[2] Vanderweele was a construction worker who, while working at a home under construction, noticed that a van on the adjacent property's driveway began to spin its wheels causing it to slide off the driveway. Vanderweele slipped and fell while walking down the adjacent property's driveway in his attempt to help the driver. The Indiana Court of Appeals was asked to review the decision of the Worker's Compensation Board (the "Board") chaired by G. Terrence Coriden. The Board had affirmed the hearing member's decision finding that Vanderweele's head injury of February 15, 1994 arose out of and in the course of his employment. The court of appeals enunciated the two factors that must be present in order for a worker's compensation claim to be found compensable under Indiana's Worker's Compensation Act. First, the injury must be "in the course of employment," and second, it must be "arising out of employment."[3]

The court of appeals explained that the question of whether an injury arises out of and in the course of employment is typically fact-sensitive.[4] However, when there are stipulated facts to which both parties agree, as in this case, the

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1. Rogers v. Bethlehem Steel Corp., 655 N.E.2d 73, 75 (Ind. Ct. App. 1995) (citing IND. CODE § 22-3-2-2 (1993); Evans v. Yankeetown Dock Corp., 491 N.E.2d 969, 973 (Ind. 1986)).

2. 660 N.E.2d 1046 (Ind. Ct. App. 1996).

3. The court of appeals was required to undergo the same fundamental analysis in four other cases decided in 1995. However, the *Vanderweele* case provides the most thorough analysis.

4. *Vanderweele*, 660 N.E.2d at 1049 (citing Burke v. Wilfong, 638 N.E.2d 865 (Ind. Ct. App. 1994)).

court considers the question to be "one of law."[5] The "in the course of employment" factor refers to where, when and how the accident occurs. The *Vanderweele* court explained that "an accident occurs in the course of employment when it takes place within the period of employment, at a place where an employee may reasonably be, and while fulfilling the duties of employment or is engaged in doing something incidental thereto."[6] The court cited *Thiellen v. Graves*[7] for an illustration of the "in the course of employment" test. In that case, Thiellen was injured while leaving the employer's premises on his motorcycle. Although Thiellen was no longer engaged in his work duties, he was still upon the premises of his employer when he was injured and was found to be in the course of his employment at the time of his injury. Thus, the *Thiellen* case lent further support to preexisting case law defining the employer's boundaries as the point at which its worker's compensation liability ends,[8] unless one of two factual exceptions exists.[9]

Under the first exception, liability extends beyond the employer's boundaries when the employee may reasonably be found there as part of his job duties.[10] Under the second, liability extends when activities incidental to employment duties result in injury while the employee is beyond the employer's boundaries, such as when an injury occurs to an employee engaged in acts that "are necessary to the life, comfort, and convenience of the workman, while at work, though personal to himself, and technically not acts of service . . . ."[11] The *Vanderweele* court concluded that Vanderweele was not reasonably expected to be upon the adjacent driveway and his being there was not incidental to his employment. Consequently, Vanderweele's off-premises injury did not "fit within any of the recognized exceptions to the requirement that the injury occur[] on the employer's premises . . . ."[12]

Having reached the conclusion that Vanderweele's injury did not occur in the

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5. *Id.* (citing Lowell Health Care Ctr. v. Jordan, 641 N.E.2d 675 (Ind. Ct. App. 1994)).

6. *Id.* (citing *Burke,* 638 N.E.2d at 868 (quoting Wayne Adams Buick, Inc. v. Ference, 421 N.E.2d 733, 735 (Ind. Ct. App. 1981))).

7. 530 N.E.2d 765 (Ind. Ct. App. 1988).

8. *Vanderweele,* 660 N.E.2d at 1050. The court quotes Markley v. Richmond Glove Corp., 156 N.E.2d 407, 413 (Ind. App. 1959) (stating that "[t]his rule provides a definite standard by which liability can be determined").

9. A thorough discussion of the two exceptions can be found in *Wayne Adams Buick, Inc.*, 421 N.E.2d at 733.

10. *Vanderweele,* 660 N.E.2d at 1050. *See also Markley,* 156 N.E.2d at 413.

11. *Vanderweele,* 660 N.E.2d at 1050 (citing Praeter v. Briquetting Corp., 251 N.E.2d 810, 812-13 (Ind. Ct. App. 1961) (quoting Holand-St. Louis Sugar Co. v. Shraluka, 116 N.E. 330, 331 (Ind. App. 1917))). Although the court indicates that activities "incidental" to employment occurring off the employer's premises still remain "within the course of employment," the quote specifically states "an accident occurring in the performance of such acts is deemed to have *arisen out of the employment.*" *Id.* (emphasis added). This suggests some overlap in the "in course of" and "arising out of" tests in the area of acts incidental to employment.

12. *Id.*

course of employment, the court nevertheless identified an additional factor to be considered in making "in the course of" determinations. The factor can be described as the circumstantial factor wherein a court must look to the "circumstances of the accident"[13] (i.e., what was the employee doing at the time of the accident?). If the employee is either engaged in his employment duties or activity incidental thereto, the injury would be in the course of employment regardless of where the injury occurred. This circumstantial factor appears to essentially restate the second exception to the rule that injuries must occur on the work premises during normal work hours to be considered in the course of employment. Moreover, its focus upon the employee's activity tends to blur the distinction between the "in the course of employment" prong and the "arising out of employment" prong.

Although the *Vanderweele* court concluded that Vanderweele's injury did not occur in the course of employment, it also went on to consider the "arising out of employment" criteria.[14] The court stated "[f]or an accident to arise out of employment, there must be a causal relationship between the employment and injury. Such a connection is established when the accident occurs out of a risk which . . . a reasonably prudent person might comprehend as incidental to the work."[15] Vanderweele argued that goodwill brought about by his charitable act would inure to the benefit of his employer and thus would be incidental to his employment. Although the hearing judge and the Board were persuaded by this argument, the court rejected it stating that "such an amorphous and speculative benefit can[not] by itself supply the required nexus between the accident and the employment so as to confer coverage under the Act."[16] The court called upon its analysis used in *KCL Corp. v. Pierce*,[17] reasoning that the employee must "owe a duty that is reasonably considered to be required by the employment or incidental thereto."[18]

The *Vanderweele* case provides a comprehensive analysis of the two-pronged "in the course of" and "arising out of" test of compensability, however, the court of appeals addressed one or both of the prongs as key issues in several other cases during 1995. For example, in *Lawhead v. Brown,*[19] the court found Brown's injury of March 29, 1994, occurring in his employer's parking lot after work hours, to be in the course of employment.[20] The court also found Brown's injury to arise out of employment because injuries occurring during the time an employee

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13. *Id.*

14. *Id.*

15. *Id.* (quoting Thiellen v. Graves, 530 N.E.2d 765, 767 (Ind. Ct. App. 1988)).

16. *Id.*

17. 226 N.E.2d 548 (Ind. App. 1967) (a case factually similar to the *Vanderweele* case involving an employee injured while pushing a car out of snow after work).

18. *Vanderweele,* 660 N.E.2d at 1051.

19. 653 N.E.2d 527 (Ind. Ct. App. 1995).

20. *Id.* at 529. The court cited Blaw-Knox Foundry & Mill Mach., Inc. v. Dacus, 505 N.E.2d 101, 102 (Ind. Ct. App. 1987), and determined that "the course of employment includes the time that employees are on the employer's premises and are going to and leaving the work place."

is leaving work are incidental to or related to employment.[21] In other words, there is a causal relationship between the employment and the injury under such circumstances.

B. Tippmann v. Hensler

Again, in *Tippmann v. Hensler,*[22] the court of appeals considered the two-pronged test for compensability under the Act. Importantly, as *Tippmann* illustrates, activities that may not appear to be causally related to employment may nevertheless arise out of employment if the employer acquiesces to such activities when the activities are common occurrences of which the employer has knowledge.[23]

In the *Tippmann* case, Hensler received an eye injury on October 19, 1990, when Tippmann and Hensler were firing paint guns in a paint booth while on a work break. Tippmann, as a prank, intentionally fired a paint gun at Hensler causing his eye injury.[24] Even though Hensler was on a work break, the court found that his injury was in the course of employment holding that "[a]ccidents occurring in the performance of acts that are reasonably necessary to the life and comfort of a workman, although personal, are incidental to employment and compensable under the Act."[25] Although the court found Hensler to be in the course of employment despite being on a work break at the time of the injury, the circumstances of the injury gave rise to a question of causal connection between the activity causing the injury and Hensler's employment.[26] The facts before the court were insufficient to enable the court to determine whether a causal nexus existed to support a finding that Hensler's injury arose out of his employment. However, the court cited its decision in *Weldy v. Kline,*[27] as an indication of its final ruling in this case depending upon the factual findings of the trial court as to whether Hensler was engaged in horseplay.

The court acknowledged that "[i]n instances where horseplay is a common occurrence and the employer, with knowledge of the facts, permits the practice to

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21. *Lawhead,* 653 N.E.2d at 529.

22. 654 N.E.2d 821 (Ind. Ct. App. 1995).

23. *Id.* at 826.

24. The court briefly reviewed a "long standing rule in Indiana" that even if an injury is intentional it is still considered "by accident" pursuant to IND. CODE § 22-3-2-6 (1993). *Tippmann,* 654 N.E.2d at 825; *see also* Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994); Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271 (Ind. 1994).

25. *Tippmann,* 654 N.E.2d at 825 (citing Evans v. Yankeetown Dock Corp., 491 N.E.2d 969, 976 (Ind. 1986)).

26. Although the facts before the court were insufficient to make a final determination, the court cited Nelson v. Denkins, 598 N.E.2d 558, 562 (Ind. Ct. App. 1992), and explained as follows: "Moreover, this court has determined that work related disputes and disagreements are consequences that arise out of and in the course of the employment relationship." *Tippmann,* 654 N.E.2d at 825.

27. 616 N.E.2d 398 (Ind. Ct. App. 1993).

continue, he has acquiesced in the horseplay, and it becomes a condition of employment."[28] The court explained that such a situation "satisfies the causal nexus between the injury and the performance of some service of the employment by demonstrating that the accident arose out of a risk which a reasonable person might have comprehended as incidental to the employment at the time of entering into it."[29] On the other hand, the court noted that if Hensler was an active participant in horseplay, his injury would not have been considered as arising out of employment because the horseplay would be an intervening cause between activities otherwise incidental to his employment and the injury.[30]

C. Rogers v. Bethlehem Steel

The court addressed the "arising out of" prong as the sole issue in *Rogers v. Bethlehem Steel*[31] and in so doing provided an analytical approach to examining whether a "causal nexus exist[ed] between the injury sustained and the duties or services performed by the injured employee."[32] The determination of a causal nexus does not always lend itself to a clear and cogent thought process, particularly when counsel must advise the client as to whether an injury arose out of employment. However, categorizing the "risk" leading to the injury may, in some circumstances, provide the analytical tool necessary to aid counsel in the role of advisor.

In *Rogers*, Joseph Rogers was murdered by a co-employee of Bethlehem Steel Corporation in September of 1992. Gary Moore, the co-employee, may have borrowed money from Rogers who "was known to carry a large sum of money and . . . loaned money to various persons in the past . . . ."[33] Witnesses testified that Moore had engaged in arguments with Rogers of a personal nature prior to Rogers's murder. The court observed that Rogers's penchant for carrying and lending large sums of money was not a condition or requirement of his job but rather a "risk personal to himself . . . ."[34] As a result, the court held that Rogers's widow's worker's compensation death benefit claim was not compensable because the injury causing his death "did not arise out of his employment with Bethlehem

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28. *Tippmann,* 654 N.E.2d at 826.

29. *Id.*

30. *Id.* Although the court recites a long standing factor in determining whether an injury resulting from horseplay is compensable (i.e., whether the employer had notice of the horseplay and acquiesced), there is some question whether this factor is applied in making such a determination. Rather, the key factor appears to be whether the injured employee was an innocent victim or active participant in the horseplay. The employer's knowledge and acquiescence appears to be presumed in cases involving an innocent victim. *See* Chicago, I. & L. RY. Co. v. Clendennin, 143 N.E. 303 (Ind. App. 1924). Also, the employer's knowledge is irrelevant in cases involving active participants. *See* Weldy v. Kline, 652 N.E.2d 107 (Ind. Ct. App. 1995).

31. 655 N.E.2d 73 (Ind. Ct. App. 1995).

32. *Id.* at 75.

33. *Id.* at 74.

34. *Id.* at 76.

Steel."[35]

The categories of risk the court used to determine whether the injury was one arising out of employment were as follows:

(1) Risks distinctly associated with the employment;

(2) Risks personal to the claimant; and

(3) Neutral risks which have no particular employment or personal character.[36]

The court, following its analysis in *Peavler v. Mitchell & Scott Machine Co.*,[37] indicated that categories one and three were risks covered by the Worker's Compensation Act, but category two risks were not compensable.[38]

Although in some factual situation it may be difficult to determine if the injury was caused by a risk personal to the claimant, Rogers and Moore were observed by others as involved in a personal dispute over a personal loan, which clearly fell into category two and was not compensable. Suffice it to say, the rule and exceptions defining the "in the course of employment" prong are less troublesome to counsel than the more amorphous determination as to whether an injury meets the causal nexus criteria of the "arising out of employment" prong.

II. AGRICULTURAL EXEMPTION: VIABILITY OF EXEMPTION

The Indiana Supreme Court in *Collins v. Day*[39] addressed the constitutionality of the provision within Indiana's Worker's Compensation Act exempting agricultural employers and their employees from coverage under the Act.[40] The Privileges and Immunities Clause of the Indiana Constitution prohibits the granting of privileges or immunities to any citizen if they are not also granted equally to all citizens.[41] In many respects, this provision is analogous to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Indiana courts have regularly applied the same analytical methodology used by federal courts and applied the "rational basis" standard to determine if a provision

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35. *Id.*

36. *Id.* at 75 (citing K-Mart Corp. v. Novak, 521 N.E.2d 1346, 1349 n.1 (Ind. Ct. App. 1988); 1 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW §§ 6.50, 11.30 (desk ed. 1995); Peavler v. Mitchell & Scott Mach. Co., 638 N.E.2d 879, 881 (Ind. Ct. App. 1994)).

37. 638 N.E.2d 879 (Ind. Ct. App. 1994).

38. *Rogers*, 655 N.E.2d at 75-76.

39. 664 N.E.2d 72 (Ind. 1994).

40. IND. CODE § 22-3-2-9 (1993). This section not only exempts agricultural employers and employees from worker's compensation coverage, it also exempts casual labor and domestic servants but allows the employers of these employees to waive the exemption and accept coverage by giving notice in writing to the employee.

41. IND. CONST. art. I, § 23.

of Indiana law violates Indiana's Constitution.[42] However, the *Collins* court concluded that there was no "settled body of Indiana law" requiring the court to use the same analytical method that courts used in determining federal constitutional questions under the Fourteenth Amendment. Thus, the court applied an "independent interpretation and application" to develop a separate standard applicable to questions arising under Indiana's Privileges and Immunities Clause.[43]

The separate standard had been distilled by the court in past cases when it did not apply a Fourteenth Amendment analytical approach. The standard consists of "two general factors."[44] The first factor requires the existence of a separate identifiable class and that the class distinction be inherent and related to the "'subject-matter of the legislation which require[s] . . . exclusive legislation with respect to the members of the class.'"[45] The second factor requires "equal availability of the preferential treatment for all persons similarly situated."[46]

In applying the two general factors, the *Collins* court observed that agricultural employers and employment, at least historically, consisted of small, often family-owned, businesses with little in the way of employee benefits, worker training or formality in the employment relationship. Moreover, farmers were not easily able to pass on the high cost of worker's compensation insurance to their customers.[47] Thus, the court concluded that there was a distinct identity to the agricultural employer class that was inherent to the subject matter of the worker's compensation exemption for agricultural employers. The court also found the exemption to be available to all agricultural employers, thereby satisfying the second factor of the court's constitutional analysis under Indiana's Privileges and Immunities Clause.

Although an amicus brief submitted by the Legal Services Organization of Indiana provided a "forceful, thorough, and well-documented" argument indicating that the exemption no longer applied to current social or economic conditions of the agricultural business in Indiana, the court stated that the "plaintiff ha[d] failed to carry the burden placed upon the challenger to negative every reasonable basis for the classification."[48] Consequently, the court did not find that the agricultural exemption violated Indiana's Privileges and Immunities Clause.

An additional question raised by the plaintiff in *Collins* was whether allowing the employer the right to waive the exemption improperly provided a privilege to the employer that was not granted to the agricultural employee.[49] The court concluded that the waiver provision did not violate the Privileges and Immunities

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42. *Collins*, 664 N.E.2d at 74.
43. *Id.* at 75.
44. *Id.* at 78.
45. *Id.* (quoting Heckler v. Conter, 381 N.E. 878, 879 (Ind. 1933)).
46. *Id.* at 79.
47. *Id.* at 81.
48. *Id.*
49. *See* IND. CODE § 22-3-2-9(b) (1993).

Clause of Indiana's Constitution because there was a rational basis for providing the privilege to the agricultural employer and not the employee. The court implied that the basis for the exemption was related to the business of farming in the Indiana business environment. In that regard, employers were responsible for the "management decisions" governing the operation of the agricultural business.[50] To allow each employee to elect coverage or not would result in inconsistency in a business in which employees tended to be transient.

For the time being, the agricultural exemption remains viable. The court's emphasis on the Legal Services Organization's amicus brief suggests that a future case arguing this issue may have the opposite result due to substantial change in Indiana's agricultural industry.

III. Discovery: The Board's Discretionary Power

In *Drew v. Quantum Systems, Inc.*,[51] the Indiana Court of Appeals was presented with two issues regarding the Board's authority and the proper exercise of discretion in its use of such authority. In *Drew*, the Board dismissed a claim for benefits as a sanction for Drew's failure to comply with the Board's order compelling Drew to submit a timely response to Quantum Systems' interrogatories. Although Drew initially argued that the Board was without authority to dismiss his claim as a sanction for his delinquent response, he conceded the Board's authority pursuant to Indiana Trial Rule 37, which is incorporated into the Board's administrative rules under Indiana Administrative Code, Title 631, Rule 1-1-3.[52]

Drew's argument focused on what he characterized as the Board's abuse of its discretion in imposing such a harsh sanction. Drew's contention was that, because he eventually answered Quantum Systems' interrogatories and did not have a long history of evading discovery, the Board abused its authority by dismissing his claim. The court disagreed with Drew and identified guidelines previously stated in *Burns v. St. Mary Medical Center*,[53] indicating that a "[d]ismissal [was] not unjust where (1) the party was given additional time within which to respond and was expressly warned that failure to respond would result in dismissal and (2) no response or motion for additional time was timely made and no reason excusing a timely response [was] demonstrated."[54]

Drew failed to respond to Quantum Systems' interrogatories for nearly four months from the October 25, 1993 date upon which he was originally requested

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50. *Collins*, 664 N.E.2d at 82.

51. 661 N.E.2d 594 (Ind. Ct. App. 1996).

52. *Id.* at 595. The issue of the Board's authority was not an issue of lengthy debate. The court merely confirmed the parties' acknowledgment of the Board's authority stating as follows: "It is well established that the Board has the authority to order parties to comply with discovery requests. Available sanctions for failure to comply with discovery orders under T.R. 37 include dismissing the action." *Id.*

53. 504 N.E.2d 1038, 1039 (Ind. Ct. App. 1987).

54. *Drew*, 661 N.E.2d at 595.

to respond. Drew did not respond to the motion to compel that was filed by Quantum Systems on February 22, 1994, and he did not request an extension of time. Thus, the Board ordered him to respond, but two months later he had not done so. On May 31, 1994, the Board ordered the case dismissed, but allowed Drew twenty days to show cause as to why the dismissal should be set aside.[55] Drew filed his response to the Board's "show cause" order two days late and indicated he would respond to the interrogatories within two weeks. Nevertheless, Drew did not answer the interrogatories for another two months.

Drew's repeated failure to respond or even comply with his own representation of when he would respond provided ample justification for the Board's proper use of its discretionary authority to dismiss Drew's claim. The *Drew* case highlights the importance of discovery in worker's compensation cases. The Board clearly has the discretionary authority to dismiss a claim or otherwise take appropriate action under law.[56]

IV. Permanent Total Disability: Case Procedure and Substance

During 1995, the Indiana courts decided two cases involving claims of permanent total disability, *K-Mart Corp. v. Morrison*[57] and *Hill v. Woodmark Corp.*[58] In so doing, the courts provided counsel and the Board guidance in both substantive law and matters of procedure.

A. K-Mart Corp. v. Morrison

In *K-Mart Corp. v. Morrison,* the Indiana Court of Appeals interpreted the scope of the provision within Indiana's Worker's Compensation Act that entitles an employer to terminate or otherwise deny compensation when an employee, without justification, refuses employment suitable to the physical limitations caused by his work injury.[59] In *K-Mart Corp.,* Morrison's reflex sympathetic dystrophy ("RSD") caused substantial physical limitations, including arm, leg and shoulder pain that resulted in her falling down and dropping things at times.[60] K-Mart offered her a position behind the jewelry counter rather than in the apparel department, which K-Mart believed to be more suitable to her physical limitations. K-Mart believed her refusal to take the job justified a reduction in its worker's

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55. *Id.*

56. In Weldy v. Kline, 652 N.E.2d 107 (Ind. Ct. App. 1995), the Board deemed unanswered admissions as being admitted as true and accurate statements. However, because the admissions led to contradictory conclusions, the Board reviewed deposition testimony to reach its conclusion. *Id.* at 109.

57. 645 N.E.2d 18 (Ind. Ct. App. 1995).

58. 651 N.E.2d 785 (Ind. 1995).

59. Ind. Code § 22-3-3-11(a) (1993) states that "[i]f an injured employee, only partially disabled, refuses employment suitable to his capacity procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the worker's compensation board such refusal was justified."

60. *K-Mart*, 645 N.E.2d at 20 n.3.

compensation obligation. Because the court determined that Morrison was totally disabled, it did not consider errors in applying Indiana Code section 22-3-3-11, other than to cite its previous decision in *Jones & Laughlin Steel Corp. v. Kilburn,*[61] stating that the referenced statute only applies to partial disabilities and not total disabilities.

More instructive, however, was the court's discussion of the meaning of its remand and K-Mart's failure to challenge the Board's findings of fact. Specifically, the court in its prior decision in *K-Mart Corp. v. Morrison,*[62] remanded the case back to the Board to use "facts as presented in the record, of Morrison's disability status."[63] The court had found that the Board's findings of fact regarding Morrison's permanent total disability were based on evidence that was not in the record.[64] K-Mart contended that the court's remand required the Board to hold a hearing and gather additional evidence. However, the court concluded that the language of its remand could "in no way be found to *require* the Board to conduct an evidentiary hearing."[65] Rather, the court simply stated that the evidence the Board previously used to support its specific findings of fact was not evidence in the record and that the Board must use evidence in the record to support its specific findings of fact. K-Mart failed to challenge the evidence ultimately used to support the Board's finding of permanent total disability. Without this challenge, the court of appeals' standard of review required it to find that the evidence in the record led to an "inescapable . . . contrary result" before it could overturn the Board's decision.[66] No such contrary result was found by the court.

K-Mart next argued that the court's prior finding—that the evidence of record did not support Morrison's disability as being either permanent or quiescent—conclusively indicated that the same evidentiary record could not support a finding of total disability. After citing the evidence in the record used by the Board to support its finding of permanent total disability, the court indicated that its prior reversal of the Board regarding whether the disability was permanent or quiescent was not inconsistent with its current finding of permanent total disability. To support this conclusion, the court referenced the distinction between temporary total disability and permanent total disability made in *Covarubias v. Decatur Casting, Etc.*[67] The *Covarubias* court recognized that temporary total disability benefits focus on whether an injury prevents the claimant from returning to the type of work he performed prior to the injury. On the other hand, permanent total disability focuses on the question of whether the claimant can return to any gainful employment.

An additional issue in *K-Mart*, which demonstrates the importance of

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61. 477 N.E.2d 345 (Ind. Ct. App. 1985).
62. 609 N.E.2d 17 (Ind. Ct. App. 1993).
63. *Id.* at 30.
64. *Id.*
65. *K-Mart Corp. v. Morrison*, 645 N.E.2d 18, 20 (Ind. Ct. App. 1995).
66. *Id.*
67. 358 N.E.2d 174 (Ind. App. 1976).

challenging questionable findings, involved the Board's decision to award total disability benefits through March 8, 1994 when the evidence in the record was closed in April of 1991. K-Mart contended that the award lacked evidentiary support. However, the court concluded that K-Mart's failure to challenge the finding that "Morrison's condition had 'grown progressively worse for lack of proper treatment'"[68] and its failure to tender any treatment specific to Morrison's condition indicated that the Board's award of total disability beyond the date when the record of medical evidence was closed was supported by the record.[69]

B. Hill v. Woodmark Corp.

While *K-Mart* is instructive to counsel on the importance of properly analyzing and challenging findings of fact, particularly in a case involving a permanent total disability claim, *Hill v. Woodmark Corp.*[70] reminds the Board of the importance of specific findings of fact supported by evidence in the record. "In an unpublished memorandum decision, the Indiana Court of Appeals did not reach the merits of the plaintiff's claim but remanded to the Board with instructions to make specific findings of fact regarding Hill's ability to obtain reasonable types of employment in light of his back injury."[71] Once the Board had issued specific findings of fact, the Indiana Court of Appeals reversed the Board's finding that Hill was not permanently totally disabled. The Indiana Court of Appeals held that the evidence in the record did not support the finding that Hill could find reasonable employment.[72]

The Indiana Supreme Court, however, stated that the Indiana Court of Appeals' decision "misperceive[d] the nature and character of the Board's role in deciding this case."[73] The Indiana Supreme Court indicated that, when the Board is in a position to determine whether the claimant has met the burden of proving a permanent total disability, there is no requirement that there be evidence in the record to make an affirmative finding that reasonable work is available. Rather, the Board need only determine that he failed to prove that he was disabled.[74] Moreover, upon remand from the Indiana Court of Appeals, the Board used evidence in the record to support its finding that Hill had not met his burden, including evidence from two doctors chronicling specific physical activities that Hill could perform. This evidence included the ability to lift specified amounts of weight, the capacity to squat, bend and stoop for periods of time, grasping ability; and full maneuverability of the neck and head.[75]

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68. *K-Mart,* 645 N.E.2d at 21 (quoting the findings of the Board).
69. *Id.*
70. 651 N.E.2d 785 (Ind. 1995).
71. *Id.* at 786.
72. Hill v. Woodmark Corp., 632 N.E.2d 1173, 1178 (Ind. Ct. App. 1994), *rev'd,* 651 N.E.2d 785 (Ind. 1995).
73. *Hill,* 651 N.E.2d at 786.
74. *Id.*
75. *Id.* at 787.

The dissent in *Hill* indicated that the majority of the Board's findings were "unsupported by the record and the remaining findings [did] not adequately show the basis of the decision against appellant."[76] It also indicated that the findings were not even minimally amenable to "appellate review."[77] The dissent stated that "[f]indings of basic facts must reveal the Board's analysis of the evidence and its determination therefrom regarding the very specific issues of fact which bear on the particular claim . . . ."[78] Notwithstanding the dissent's disagreement with the majority in *Hill*, one thing remains certain. Findings of fact must be supported by evidence in the record, and the courts are not reluctant to remind both counsel and the Board of the importance of this matter of procedure, particularly when the claim involves permanent total disability.

V. APPORTIONMENT

The issue addressed in *U.S. Steel Corp. v. Spencer*[79] involved the proper interpretation and application of the apportionment statute within Indiana's Worker's Compensation Act, which reads in pertinent part, as follows:

> If an employee has sustained a permanent injury either in another employment, or from other cause or causes than the employment in which he received a subsequent permanent injury by accident, . . . he shall be entitled to compensation for the subsequent permanent injury in the same amount as if the previous injury had not occurred: Provided, however, that *if the permanent injury for which compensation is claimed, results only in the aggravation or increase of a previously sustained permanent injury or physical condition . . . the board . . . shall award compensation only for that part of such injury, or physical condition resulting from the subsequent permanent injury.*[80]

In addressing the question of apportionment, the court provided guidance to counsel as to when the following legal maxim applies:

> [T]he employer takes his employees as he finds them, if he takes them at all, and if they sustain injuries by accident arising out of and in the course of employment they are entitled to compensation for their own injuries, not for the injuries physically and mentally perfect employees would have sustained in like accidents.[81]

Notwithstanding the court's guidance, the efficacy of the apportionment statute's role in claims wherein a subsequent injury results in permanent total disability must also be seriously questioned as a result of *U.S. Steel Corp.*

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76. *Id.* at 790 (DeBruler, J., dissenting).
77. *Id.*
78. *Id.* (quoting Perez v. U.S. Steel Corp., 426 N.E.2d 29 (Ind. 1981)).
79. 645 N.E.2d 1106 (Ind. Ct. App. 1995).
80. IND. CODE § 22-3-3-12 (1993) (emphasis added).
81. Goodman v. Olin Matheison Chem. Corp., 367 N.E.2d 1140, 1146 (Ind. App. 1977).

The *U.S. Steel Corp.* court indicated that the apportionment statute does not apply to reduce an employer's liability for benefits when the employee is only predisposed or somehow more susceptible to a particular injury.[82] However, if there is a pre-existing impairment that "combines with an impairment resulting from a subsequent compensable accidental injury to render [the claimant] either permanently totally disabled or permanently partially impaired in a greater degree than would have resulted from the subsequent injury had there been no pre-existing impairment,"[83] then the apportionment statute applies to reduce the employer's liability to the amount of impairment or disability caused by the injury that occurred during employment. Thus, whether the apportionment statute applies depends upon whether a preexisting condition of the body is an impairment or a disability, or simply a predisposition or susceptibility to an injury that the current work injury exacerbated or aggravated.

A compelling question prompted by *U.S. Steel Corp.* is whether, in light of the case law definition of "disability," a permanent total disability is subject to apportionment based on either a preexisting disability or permanent impairment. In *U.S. Steel Corp.*, Spencer had a preexisting back injury resulting from an accident while playing baseball in 1973. In 1974, Spencer underwent surgery to fuse his spine. Unfortunately, the spinal fusion deteriorated causing Spencer to take a leave of absence from work for a year.[84] Upon returning to work at U.S. Steel, Spencer was restricted from heavy lifting, bending and standing. He continued back treatments from 1975 to the date of his second injury on June 15, 1983. According to medical testimony, his injury resulted in a fifty-five percent permanent partial impairment rating, twenty percent of which was considered causally connected to the second injury.[85]

Although the facts of this case appear to properly invoke application of the apportionment statute, they call into question an interesting conundrum brought about by a distinction between the term "impairment" and the term "disability" under Indiana's Worker's Compensation Act. As the court succinctly explains, "the issue of physical impairment concerns medical evidence related to the loss of bodily function, whereas a disability determination rests on vocational factors relating to the ability of an individual to engage in reasonable forms of work activity."[86] Although the Board relied upon the medical findings of Spencer's doctor to determine that only twenty-percent of Spencer's impairment was caused by his 1983 work injury, it also appeared to rely on the testimony of a clinical psychologist concerning Spencer's permanent total disability. In that regard, the clinical psychologist observed that Spencer was capable of working, although in a diminished capacity, from the date of his 1973 baseball injury up to the date of

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82. *U.S. Steel Corp.*, 645 N.E.2d at 1108 (citing Bethlehem Steel Corp. v. Cummings, 310 N.E.2d 565 (Ind. App. 1974)).

83. *Id.* at 1108 (citing *Goodman*, 367 N.E.2d at 1140).

84. *Id.* at 1107.

85. *Id.* at 1108.

86. *Id.* at 1109 (citing Rockwell Int'l v. Byrd, 498 N.E.2d 1033 (Ind. Ct. App. 1986)).

his 1983 work injury,[87] at which point he was no longer able to engage in gainful employment. Because the Board appeared to have relied on the "conflicting opinions of the experts,"[88] the court remanded the case to the Board to determine if Spencer was "suffering from a condition which impaired or disabled him prior to the 1983 injury."[89] If so, the court directed the Board to apply the apportionment statute.

The problem in this case is that Spencer, *medically*, would appear to have suffered a preexisting permanent impairment entitling U.S. Steel to apportionment for the impairment caused by the 1983 injury. Moreover, Spencer's work activities from 1973 to 1983 were limited or diminished based on his medical restrictions suggesting some type of disability. However, upon remand, the Board did not apportion the award for the permanent total disability that resulted from the subsequent 1983 work injury. This evokes the important question of whether the Board must find a preexisting *permanent partial* disability in order to apply the apportionment statute to Spencer's resulting permanent total disability. If so, the *U.S. Steel Corp.* case was over at the moment both parties agreed that permanent total disability resulted from the 1983 work injury because Indiana's Worker's Compensation Act, unlike other worker's compensation acts, does not recognize *permanent partial* disability, at least as a separately compensable type of injury.[90] Indeed, under Indiana law, a permanent disability only exists if it is one-hundred percent disabling despite references to the contrary in prior and subsequent cases.[91]

To further explain, in *K-Mart Corp. v. Morrison*[92] the court distinguished "temporary total disability from permanent total disability."[93] The distinction referenced indicates that the term "disability," in the context of temporary total

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87. Spencer returned to work after his 1973 injury "with a heavy lifting, bending and standing work restriction imposed on him by his physician." *Id.* at 1107.

88. *Id.* at 1109.

89. *Id.*

90. *See* Jenkins v. Pullman Standard Car Mfg. Co., 139 N.E.2d 566 (Ind. Ct. App. 1957). Under Indiana's Occupational Diseases Act found at IND. CODE §§ 22-3-7-1 to -38 (1993 & Supp. 1996), the loss or loss of use of any eye or appendage (i.e., schedule injuries) is referred to as a disablement whereas, the same loss or loss of use of an eye or appendage under Indiana's Worker's Compensation Act is not referred to as a disablement. Thus, it could be argued that a scheduled injury is tantamount to a *permanent partial* disability despite the terminology. If so, a preexisting scheduled injury coupled with a subsequent injury causing permanent total disability could allow for the apportionment of the permanent total disability.

91. In Goodman v. Olin Matheison Chem. Corp., 367 N.E.2d 1140, 1144 (Ind. App. 1977), the court explained that someone can be permanently disabled to a "greater degree" if they have a preexisting injury. Again, in a subsequent decision of *U.S. Steel Corp.*, the concept of a "naturally progress[ing]" disability was suggested to imply that Spencer may have been disabled but not such that the disability would have naturally progressed to total disability. U.S. Steel Corp. v. Spencer, 655 N.E.2d 1243, 1247 (Ind. Ct. App. 1995). Consequently, both cases strongly suggest a type of permanent disability that is less than total.

92. 645 N.E.2d 18 (Ind. Ct. App. 1995).

93. *Id.* at 20 (citing Covarubias v. Decatur Casting, Etc., 258 N.E.2d 174 (Ind. App. 1976)).

disability, means the employee is unable to return to the type of work he was performing immediately prior to the injury. The term "disability" within the context of permanent total disability means the employee is unable to return to any gainful employment. Based on the facts in *U.S. Steel Corp.*, it would appear that Spencer was able to return to gainful employment but unable to return to the type of work he was performing prior to the 1973 baseball injury. In that regard, it could be said that, between 1973 and 1983, Spencer was "disabled" in accordance with the definition of temporary disability. Undeniably, the facts indicate that he was not permanently disabled as a result of his 1973 baseball injury because he remained gainfully employed by U.S. Steel and was able to work.

In the subsequent decision in *U.S. Steel Corp.*,[94] the court affirmed the finding of the Board that there was no basis upon which to apportion Spencer's disability. On remand, the Board did not focus on impairment but rather issued findings regarding disability. In fact, the Board rejected the medical testimony upon which it, in part, preliminarily relied and instead focused on the expert opinion of the clinical psychologist. It would seem the Board was quite aware that it could not apportion a "disability" as defined under the permanent total disability definition of *Covarubias*. Specifically, a person with a "disability," as defined under the permanent total disability definition in *Covarubias*, would never find himself back in the work place to be subjected to a subsequent injury, which the apportionment statute was enacted to address.

The Board, arguably, could have found Spencer's *impairment* apportionable relying on the purely medical testimony of the medical expert. However, the Act does not contemplate a deduction in benefits when an apportionable impairment exists if the claimant is permanently and totally disabled. In other words, an apportionment of Spencer's "impairment" would not have reduced U.S. Steel's benefit payment obligation to Spencer because there was no separate additional permanent partial impairment benefit award "stacked" on top of the permanent total disability award. Moreover, because impairment addresses a purely physical measurement of some loss of bodily function, whereas disability measures the effect the loss of function has on the claimant's ability to work, it is difficult to reason how a preexisting impairment would diminish an employer's obligation for an employee's subsequent disability.

To further analyze this problem, a preexisting impairment and a subsequent impairment are capable of being added together under the apportionment statute to create a permanent total disability. There is no doubt that two injuries to the same part of the body can be added to produce a greater impairment than each injury standing alone would cause. There is equally no doubt that the apportionment statute allows the Board to identify the impairment rating of each of the two injuries and only charge the employer with the responsibility of paying the permanent partial impairment benefits attributable to the degree of impairment caused by the injury that occurred in its employment. As long as the issue is confined to permanent partial impairment, the apportionment statute seems to work fine. However, when the two injuries combine to produce an impairment,

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94. U.S. Steel Corp. v. Spencer, 655 N.E.2d 1243 (Ind. Ct. App. 1995).

which, together with vocational factors, results in permanent total disability, the employer's permanent partial impairment benefit liability changes to an obligation to pay permanent total disability benefits. Any credit the employer would have received in terms of a reduction for the preexisting impairment is lost unless the Board and courts recognize that a disability can exist without being a total disability.

In *U.S. Steel Corp.*, the Board and the court attempted to "square" the unequal sides of the dilemma brought to light by the apportionment statute by implying that a permanent total disability can be apportioned if the prior injury "would naturally progress into permanent total disability on its own."[95] Although such a standard would place an employer in the difficult position of obtaining vocational evidence to establish that a preexisting injury was capable of deteriorating to a point at which a claimant would no longer be able to work, it also suggests that due to a preexisting injury a partial disability can coexist with a permanent partial impairment and a subsequent injury can accelerate the partial disability into a permanent total disability. Consequently, the apportionment statute may still be able to fully serve its benign purpose by allowing for the apportionment of permanent total disability if the Board and courts recognize that partial disability is the type of preexisting disability contemplated by the apportionment statute.[96] This however would require a permanent partial impairment to coexist with a *temporary* partial disability.[97]

In the context of the necessarily retrospective application of the apportionment statute, it is not inconsistent for the Board or courts to find that a claimant with an injury causing some permanent partial impairment can remain gainfully employed although partially disabled by the impairment. The evidence of partial disability, demonstrated by the facts in *U.S. Steel Corp.*, would be the diminished physical capacity of the employee that required a medical restriction as to the work he or she was able to perform.[98] This concept is consistent with the partial disability referenced in Indiana Code section 22-3-3-11.[99]

Importantly, however, recognizing the possibility of partial disability in the context of the apportionment statute would not require the Board or courts to interpret such partial disability as separately compensable. The Board and the courts would also not be required to interpret the temporary partial disability benefits statute as requiring the employer to pay benefits under the statute as an additional benefit after a permanent partial impairment is established.[100] In *U.S.*

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95. *Id.* at 1247.

96. The concept of partial disability is embodied in IND. CODE § 22-3-3-11 (1993).

97. A temporary disability, either partial or total, is temporary because it has not reached quiescence and is not yet capable of being rated as a permanent impairment.

98. Due to the requirement of reasonable accommodation under the Americans With Disabilities Act, it is likely that workers, who in the past may have been unable to work, will now remain gainfully employed although not in the same job capacity.

99. Although the statute does not include the word "temporary" with its text, it has been interpreted as one of the statutes addressing temporary partial disability.

100. IND. CODE § 22-3-3-9 (1993). Under this statute, the Board has interpreted the benefits

Steel Corp., the Board could have used Spencer's permanent impairment apportionment ratio to apportion Spencer's permanent total disability by finding that Spencer had a temporary partial disability that clearly restricted his ability to perform certain types of work. Unfortunately, the Board may have been saddled with the "all or nothing" definition of permanent total disability that leads inextricably to virtually never finding a preexisting disability.

VI. Second Injury Fund

Linville v. Hoosier Trim Products[101] required the court to interpret the provision within Indiana's Worker's Compensation Act defining the purpose of the second injury fund. Specifically, Indiana Code section 22-3-3-13(a) provides as follows:

> If an employee who from any cause, had lost, or lost the use of, one (1) hand, one (1) arm, one (1) foot, one (1) leg, or one (1) eye, and in a subsequent industrial accident becomes permanently and totally impaired by reasons of the loss, or loss of use of, another such member or eye, the employer shall be liable only for the compensation payable for such second injury. However, in addition to such compensation and after the completion of the payment therefore, the employee shall be paid the remainder of the compensation that will be due for such permanent impairment out of a special fund known as the second injury fund . . . .

In this case, Linville received an injury in 1982 that resulted in an eleven percent permanent partial impairment of her right hand and then received an injury in 1988 resulting in a thirty-seven percent permanent partial impairment of her left hand. The combined result of these two injuries left her permanently totally disabled. The court was asked to interpret two phrases within the statute. First, the court was required to interpret whether the phrase "lost" or "lost the use of" required a finding that the body part must be a one-hundred percent loss or must be one-hundred percent unable to function. Then, the court was required to interpret the meaning of the phrase "permanently and totally impaired."[102]

In explaining its approach the court cited *Associated Insurance Companies, Inc. v. Burns,*[103] stating that a "liberal construction is necessary to accomplish the Act's beneficent purposes."[104] Although the Board denied Linville's claim against the second injury fund because she had not lost one-hundred percent use of either hand, the court held that "'loss of use' should be interpreted to refer to either total

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to be due only during the time prior to the claimant reaching maximum medical improvement. *See* Kohman v. Indiana University, No. 93A029512-EX00750 (Ind. Ct. App. Dec. 20, 1995) (unpublished decision).

101. 659 N.E.2d 250 (Ind. Ct. App. 1995).

102. *Id.* at 252.

103. 562 N.E.2d 430 (Ind. Ct. App. 1990).

104. *Linville*, 659 N.E.2d at 252.

or partial loss."[105] The court also explained that the Board's interpretation of "permanent and totally impaired" had a very narrow application.[106] Because a narrow application would have been inconsistent with a liberal construction of the law, the court concluded that permanent and total impairment was synonymous with permanent total disability. Consequently, the court found that Linville's diminished use of both hands resulted in permanent total disability entitling her to benefits from the second injury fund.

The dissent in this case believed that the language of the statute was unambiguous particularly in light of "Ind. Code § 22-3-3-10(c) which distinguishes between accidents causing 'loss by separation,' 'loss of use,' and 'partial loss of use.'"[107] Thus, the dissent believed that "loss of use" could only mean one-hundred percent loss of use, which did not occur to either of Linville's hands. The dissent, therefore, agreed with the Board's decision.

In the rehearing of *Linville v. Hoosier Trim Products*,[108] the court adopted the logic of the dissent in the initial *Linville* decision. The court overturned its original decision finding that the terms "lost" and "lost the use of" were not ambiguous simply because they were not defined in the Worker's Compensation Act. The court defined "loss" as a "total deprivation of a body part, or the total deprivation of the use of a body part."[109] Moreover, the court noted that because Indiana Code section 22-3-3-10(c) references "partial loss," the term "loss" must be modified by the term "partial" to be construed as a partial loss.[110]

The court of appeals appears to be divided regarding the viability of claims against the second injury fund. Thus, counsel may be well advised to review the merits of any case involving preexisting and subsequent scheduled injuries before making a claim against the fund.

VII. MEDICAL EXPENSES

In *Montgomery Aviation, Inc. v. Hampton,*[111] the court was asked to "adopt a definition of 'necessary'" medical expenses. The term "necessary" medical expenses is not defined in Indiana's Worker's Compensation Act. Indiana Code section 22-3-3-4 simply states that the employer must pay for "'such surgical, hospital and nursing services and supplies as the attending physician or the worker's compensation board may deem necessary.'"[112]

In *Montgomery Aviation*, Hampton had three knee surgeries, the first in July of 1990, the second in January of 1991, and the third in February of 1992. Montgomery Aviation argued that the third surgery was not a medically necessary

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105. *Id.*
106. *Id.*
107. *Id.* at 253 (Darden, J., dissenting).
108. 664 N.E.2d 1178 (Ind. Ct. App. 1996).
109. *Id.* at 1179 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1976)).
110. *Id.*
111. 650 N.E.2d 77, 80 (Ind. Ct. App. 1995).
112. *Id.* at 79 (citing IND. CODE § 22-3-3-4(a) (1993)).

expense because the evidence of record suggested that the doctors did not believe it would cure or relieve Hampton's problem.[113] Montgomery Aviation's definition of "necessary" would have required the doctor to "'reasonably believe the treatment [would] have a curative or relieving effect' upon the injury."[114] The court refused to adopt such a definition.

The court cited *Talas v. Correct Piping Co.*[115] as demonstrating that "noncurative, prospective palliative measures, such as nursing services and physical therapy"[116] are within the ambit of medical expenses for which an employer is liable under Indiana's Worker's Compensation Act. However, the court explained that *Talas* did not provide much guidance with respect to retrospective medical expenses for a surgical procedure that was noncurative in nature.

In providing counsel guidance as to the type of medical expenses for which an employer may be liable, the court looked to evidence indicating that Hampton's surgery was, at minimum, believed to uncover the nature of his knee pain. Moreover, there was also evidence that the surgeon believed the surgery would improve Hampton's knee condition.[117] *Montgomery Aviation* appears to define medical expenses for which the employer is liable to include exploratory procedures that are expected to help in diagnosing medical conditions.[118]

VIII. Attorney's Fees

Unfortunately, *Connecticut Indemnity Co. v. Bowman*[119] does not provide counsel much guidance in the area of what action constitutes bad faith entitling plaintiff's counsel to an award of attorney's fees. However, from a procedural perspective, it is instructive with respect to stipulated cases. In *Connecticut Indemnity*, Bowman filed an action against Connecticut Indemnity Co. ("CIC"), the insurance carrier of Standard Locknut and Lockwasher, Inc. ("Standard Locknut"), based on gross negligence, constructive fraud and intentional infliction of emotional distress.[120] CIC argued that Bowman was collaterally estopped from his lawsuit because the Board did not find in favor of Bowman upon his request for attorney's fees based on the allegation that "the employer had acted in bad faith

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113. *Id.* at 78.

114. *Id.* (quoting Brief of Appellant).

115. 435 N.E.2d 22 (Ind. 1992).

116. *Hampton*, 650 N.E.2d at 79.

117. *Id.*

118. The court pointed out that, even though the surgery was unsuccessful in curing Hampton's problem, "in such surgery, no one can give a guarantee; there is never an assurance of cure." *Id.* The court also took exception to Montgomery Aviation's suggestion that the only reason the third surgery was performed was because Hampton wanted it to be performed. Such a suggestion implies that "surgeons are willing to perform invasive procedures without good cause." *Id.*

119. 652 N.E.2d 880 (Ind. Ct. App. 1995).

120. *Id.* at 882.

in adjusting and settling" Bowman's claim.[121] CIC also argued that, because Bowman's claim for attorney's fees based on bad faith was not among the issues to which the parties stipulated, Bowman's request for attorney's fees was not timely made.[122] The court found that, because the Board did not issue specific findings regarding the basis for its denial of Bowman's claim for attorney's fees and because the Board could have denied Bowman's claim for attorney's fees on more than one basis,[123] Bowman was not collaterally estopped from filing his lawsuit against CIC.

Although Bowman also argued that the Board had a statutory duty to determine whether bad faith claims handling existed, the court did not address this issue. Nevertheless, this case suggests the possibility that the Board will deny claims for attorney's fees based on bad faith in stipulated cases if the issue is not preserved within the scope of the parties' stipulation.

IX. STATUTE OF LIMITATIONS

The decision in *East Asiatic/Plumrose, Inc. v. Ritchie*[124] may cause counsel substantial concern in terms of advising clients whether a claim has been closed based on the statute of limitations. *Plumrose* interpreted Indiana Code section 22-3-3-27, often referred to as the modification statute, which allows for a claim to be reopened by the Board when a change in circumstance indicates the need.[125] The statute of limitations, at least prior to the *Plumrose* case, enabled counsel to provide guidance to their clients as to the point in time when the average claim finally closed, meaning that it was no longer subject to modification under the modification statute. As used herein, the term "average claim" refers to a claim involving an employee who is injured such that she is unable to return to the work she was doing when she was injured and therefore receives temporary total disability ("TTD") benefits until such time as she is fully recuperated and back at her job. In the past, counsel could advise their clients that such an average claim could be considered closed two years after the date the last TTD benefits were paid. The decision in *Plumrose*, however, no longer allows such advice to be given. As a result of expected uncertainty in closing claims, absurd and unintended action may prevail and cause a greater burden on Indiana's worker's compensation system.

In *Plumrose*, claimant Ritchie was injured on July 6, 1988 when "a pipe penetrated the roof of his mouth and the frontal lobe of his brain."[126] Ritchie was paid in accordance with the "agreement to compensation" form, which was signed

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121. *Id.* at 882, 883 (quoting IND. CODE § 22-3-4-12 (1993)).

122. *Id.*

123. "[T]he Board could have denied the request because it was outside the scope of the issues, or it could have denied the request because it found neither Standard Locknut nor CIC acted in bad faith." *Id.* at 883.

124. 655 N.E.2d 87 (Ind. Ct. App. 1995).

125. IND. CODE § 22-3-3-27(a) (1993).

126. *Plumrose*, 655 N.E.2d at 88.

by him and approved by the Worker's Compensation Board.[127] The agreement to compensation was signed on July 25, 1988, indicating TTD benefit payments were to begin on July 14, 1988. Shortly thereafter, the agreement was approved by the Board.[128] As is typical in such cases, TTD benefits continued until Ritchie was released to return to work, which occurred on April 16, 1990. However, on April 24, 1990, Ritchie left work and was admitted to a hospital. Although Ritchie was discharged from the hospital three weeks later, he never returned to work.[129] As a result of his doctor determining that Ritchie had reached maximum medical improvement, Plumrose and Ritchie entered into a settlement on October 11, 1990 in which 100 weeks of permanent partial impairment ("PPI") benefits were paid. The PPI benefits technically were paid from July 6, 1988 to June 21, 1990.[130]

On May 4, 1992, Ritchie filed an application with the Board to modify the permanent partial impairment settlement. In response, Plumrose sought to dismiss Ritchie's claim based on lack of jurisdiction alleging that the statute of limitations within Indiana Code section 22-3-3-27(c) barred modification of Ritchie's settlement. The statute reads as follows:

> The [Board] shall not make any such modification upon its own motion nor shall any application therefore be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the *original award* made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid.[131]

The court rejected Plumrose's argument that the statute of limitations should bar Ritchie's application for modification. The court held that the phrase "original award" does not refer to the award of TTD benefits. Rather, "[i]t is the permanent partial impairment award that usually adjudicates the injured employee's right to compensation up to that point in time."[132] Moreover, the court seized upon the final clause of Indiana Code section 22-3-3-27(c) which states, "applications for increased *permanent partial impairment* are barred unless filed within one (1) year from the last day for which compensation was paid."[133] The court reasoned that the last clause of the above-referenced statute "suggests that the 'original award' includes the award of PPI; a claimant cannot seek to increase PPI unless an award of PPI had previously been made."[134] Thus, the court's decision in *Plumrose* holds that a claim that only involved the award of TTD benefits does not contain an "original award." Without an original award, the statute of limitations period set

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* (emphasis added) (citing IND. CODE § 22-3-3-27(c) (1993)).
132. *Id.* at 90.
133. *Id.* (emphasis added) (quoting IND. CODE § 22-3-3-27(c) (1993)).
134. *Id.*

forth in the modification statute will not begin. Consequently, claims for which only TTD benefit payments are made remain subject to modification to an uncertain date in the future.

The "fallout" of the *Plumrose* decision may cause insurance carriers to maintain financial reserves for a longer period of time on claims involving only TTD benefits, even when the claimant has returned to work without any indication of a future manifestation of the injury. If this is the result, employers may pay higher insurance premiums based on the cumulative effect of long outstanding claim reserves on claims that heretofore would have been closed. Employers that are not subject to reserving practices and procedures of insurance carriers or third party administrators may have an even greater competitive advantage in the market place as a result.

In addition, counsel may be forced to become involved in claims in which they would otherwise not be involved. It can be expected that employers will not wish to have claims remain open in virtual perpetuity. In an effort to close these "TTD only" claims, employers may seek permanent partial impairment ratings from their doctors. Claims that would otherwise go unrated simply because the claimant has fully recuperated may now need to be rated. Employers may not be able to afford the open liability associated with claims that do not have some type of PPI rating. The claimant may respond to the PPI rating by retaining her own counsel to dispute the rating. The end result may be more litigation and, hence, more burden on a system originally designed to minimize litigation. It remains to be seen whether claims that only involve TTD benefits will precipitate a great burden upon Indiana's worker's compensation system.

X. EXCLUSIVE REMEDY

> The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident *shall exclude all other rights and remedies of such employee*, the employee's personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death . . . .[135]

In 1995, the courts considered a number of cases involving the exclusive remedy provision of the Indiana Worker's Compensation Act. Typical to this line of cases, defendants in tort suits often attempted to avoid the trial court's jurisdiction by invoking Indiana Code section 22-3-2-6, also known as the exclusive remedy provision of the Act, arguing that the plaintiffs' sole remedy was with the jurisdiction of the Board. In 1995, the courts' analysis of the exclusive remedy provision of the Worker's Compensation Act included four cases in which individuals who are often described as "loaned or borrowed servants" or "leased employees" sought to invoke the exclusive remedy statute as a fellow servant or coemployee of the injured party.[136] The courts also reviewed three cases in which

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135. IND. CODE § 22-3-2-6 (Supp. 1996) (emphasis added).

136. Williams v. R.H. Marlin, Inc., 656 N.E.2d 1145 (Ind. Ct. App. 1995); U.S. Metalsource

a plaintiff injured by a coemployee attempted to avoid the exclusive remedy statute by raising the horseplay or intentional acts exception to the statute.[137] Finally, the courts reviewed two cases in 1995 in which exclusive jurisdiction of the Board was avoided, once based upon the type of injuries claimed by the plaintiff,[138] and once based upon the nature of the claimant.[139]

A. Exclusive Remedy Statute Invoked Under the Coemployee/Fellow Servant Doctrine—Summary Judgment v. Motion to Dismiss

1. Riffle v. Knecht Excavating, Inc.—In *Riffle,*[140] the court reviewed the classic set of circumstances in which the exclusive remedy provision is invoked by a defendant who is commonly described as a loaned or borrowed servant or leased employee and thereby claims tort immunity as a coemployee of the plaintiff. Riffle's employer, a contractor, rented a backhoe and an operator to excavate a large hole as part of a construction project.[141] Riffle was injured when struck by a portion of the earthen wall that had dislodged while he worked at the bottom of the hole. Riffle thereafter sued the backhoe operator, the excavating company from which the backhoe and the operator were rented, and the property owner.

The backhoe operator's motion for summary judgment was granted by the trial court, apparently on grounds that the backhoe operator was a borrowed servant of Riffle's employer and thus a fellow employee of Riffle, removing the negligence claim from the jurisdiction of the trial court and placing Riffle's remedy exclusively with the Board.[142] In considering Riffle's argument that the trial court erred in finding the backhoe operator to be a borrowed servant, the court first reiterated the well established standard of review, indicating that in reviewing the entry of summary judgment it could not weigh the evidence but could only "consider the facts in the light most favorable to the nonmoving party."[143] The court went on to acknowledge that the appropriate test to determine whether Riffle and the backhoe operator were coemployees was whether the backhoe operator could also have received worker's compensation benefits from Riffle's employer had the backhoe operator been injured under similar circumstances.[144] In granting summary judgment, the court applied the test by considering those facts most favorable to Riffle as the nonmoving party.

Corp. v. Simpson, 649 N.E.2d 682 (Ind. Ct. App. 1995); Tapia v. Heavner, 648 N.E.2d 1202 (Ind. Ct. App. 1995); Riffle v. Knecht Excavating, Inc., 647 N.E.2d 334 (Ind. Ct. App. 1995).

137. Tippmann v. Hensler, 654 N.E.2d 821 (Ind. Ct. App. 1995); Weldy v. Kline, 652 N.E.2d 107 (Ind. Ct. App. 1995); *Tapia,* 648 N.E.2d at 1202.

138. Terrell v. Rowsey, 647 N.E.2d 662 (Ind. Ct. App. 1995).

139. Ransburg Indus. v. Brown, 659 N.E.2d 1081 (Ind. Ct. App. 1995).

140. *Riffle,* 647 N.E.2d at 334.

141. *Id.* at 336.

142. *Id.*

143. *Id.* (citing Collins v. Covenant Mut. Ins. Co., 604 N.E.2d 1190, 1194 (Ind. Ct. App. 1992)).

144. *Id.* at 337 (citing Weldy v. Kline, 616 N.E.2d 398, 401-02 (Ind. Ct. App. 1993)).

The facts included that the backhoe operator was employed by Riffle's employer in the usual course of its business, performed the same type of work as the other regular employees working for Riffle's employer, reported daily to the worksite supervisor for instruction, was provided with specific instruction as to the work that he was to perform, and was provided with no discretion in the performance of the work.[145] Under these facts, the court ruled that the backhoe operator was also an employee of Riffle's employer and that the employment was not casual. Thus, the backhoe operator was deemed a coemployee of Riffle and thereby immune from Riffle's negligence action pursuant to Indiana Code section 22-3-2-6.[146] The court rejected Riffle's argument that the backhoe operator's dual employment created a question of fact precluding summary judgment by relying on the similar facts of *Sharp v. Bailey*.[147] Interestingly, in a footnote, the court acknowledged that the seven factor test set forth in *Hale v. Kemp* for determining whether an employer/employee relationship existed was appropriate, but "the cases employing these factors were largely irreconcilable."[148]

Following *Riffle*, the court considered three additional "dual employment" or "loaned or borrowed" servant cases on jurisdictional grounds by way of review of the trial courts' summary judgment rulings.[149] These cases are significant in light of the courts' analysis of the pretrial procedure involving the use of a Trial Rule 56 motion for summary judgment to address the jurisdictional questions raised by the exclusive remedy provision of the Worker's Compensation Act.

2. Tapia v. Heavner.—In *Tapia*, the Fifth District was required to review the employment status of Tapia, who was injured by Heavner, an employee of Ohlson & Associates (collectively "Ohlson"), the employer to which Tapia's services were "loaned" by her general employer, Standard Life Insurance Company of Indiana ("Standard Life").[150] Tapia filed a negligence action against Ohlson, and Ohlson asserted lack of subject matter jurisdiction as a defense. Ohlson later filed a motion for summary judgment alleging that, because it was Tapia's employer, her exclusive remedy was with the Board pursuant to Indiana Code section 22-3-2-6. The trial court agreed and granted Ohlson's motion.[151]

Unlike the *Riffle* court, the *Tapia* court did not apply the typical summary judgment standard of review.[152] Instead, the court analyzed the jurisdictional basis

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145. *Id.*

146. *Id.*

147. *Id.* (citing Sharp v. Bailey, 521 N.E.2d 368 (Ind. Ct. App. 1988)).

148. *Id.* at 337 n.1 (citing Hale v. Kemp, 579 N.E.2d 63, 67 (Ind. 1991)).

149. Williams v. R.H. Marlin, Inc., 656 N.E.2d 1145 (Ind. Ct. App. 1995); U.S. Metalsource Corp. v. Simpson, 649 N.E.2d 682 (Ind. Ct. App. 1995); Tapia v. Heavner, 648 N.E.2d 1202 (Ind. Ct. App. 1995).

150. *Tapia,* 648 N.E.2d at 1204-05.

151. *Id.* at 1205.

152. "When reviewing an entry of summary judgment, we stand in the shoes of the trial court. We do not weigh the evidence but will consider the facts in the light most favorable to the nonmoving party." *Riffle,* 647 N.E.2d at 336 (citing Collins v. Covenant Mut. Ins. Co., 604 N.E.2d 1190, 1194 (Ind. Ct. App. 1992)).

of Ohlson's summary judgment motion and noted that "[t]he defense that a claim is barred by the exclusivity provision of the Act is an attack upon the court's subject matter jurisdiction which cannot form the basis of a motion for summary judgment."[153] The court went on to instruct that the proper procedural means of raising a jurisdictional defense such as the exclusive remedy statute is through an affirmative defense or a motion to dismiss under Indiana Rules of Procedure, Trial Rule 12(B)(1). Moreover, the court correctly pointed out that, if a court lacking subject matter jurisdiction takes action on the merits, such as by ruling on a motion for summary judgment, its action is void.[154]

The distinction between Ohlson's use of a summary judgment motion as opposed to a motion to dismiss is significant in light of the factual nature of the dispute involving the determination of Tapia's employment status. In considering Tapia's argument that she was not employed by Ohlson at the time of her injury but instead by her general employer, Standard Life, the court recited the well established Indiana law that a person can have more than one employer as exemplified in *Fox v. Contract Beverage Packers, Inc.*[155] Tapia agreed that the seven factor test set forth in *Fox*[156] was the proper vehicle for determining whether she was under the dual employment of Ohlson and Standard Life at the time of her injury, but, because a number of the applicable material facts were in dispute, Tapia argued that the court's granting of Ohlson's motion for summary judgment was improper.[157]

The court agreed that the trial court was presented with a factual dispute and even acknowledged that, if it had resolved the matter under a standard of review for summary judgment motions, it would have been compelled to reverse.[158] However, because the court determined that Ohlson's action should have been treated by the trial court as a motion to dismiss under Trial Rule 12(B)(1), a weighing of the evidence was proper. "Unlike ruling on a motion for summary judgment, the trial court *may weigh evidence and resolve factual disputes* when ruling on a motion to dismiss for lack of subject matter jurisdiction."[159] Thus, it is proper for the trial court to consider and resolve any factual disputes, and the

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153. *Tapia,* 648 N.E.2d at 1205 (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994)).

154. *Id.* (citing *Perry,* 637 N.E.2d at 1282).

155. *Id.* at 1206 (citing Fox v. Contract Beverage Packers, Inc., 398 N.E.2d 709 (Ind. Ct. App. 1980)).

156. Test for determining the existence of an employee/employer relationship as set forth in *Fox* requires consideration of the following facts: "(1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties and the existence of an employer/employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries." *Id.* (citing *Fox,* 398 N.E.2d at 711-12).

157. *Id.*

158. *Id.* at 1205.

159. *Id.* (emphasis added) (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1286 (Ind. 1994)).

court of appeals should affirm the trial court on any theory that is supported by evidence contained in the record.[160]

The impact of the *Tapia* court's procedural analysis cannot be diminished. Had it applied the summary judgment standard of review employed by the *Riffle* court, it would have been compelled to reverse and remand for the trier of fact to resolve the issue of whether Tapia was employed by both Ohlson and Standard Life. Instead, the court engaged in a review of the facts relating to the *Fox* seven factor test and found that at least five of the seven factors supporting Tapia's employment by Ohlson were present.[161] The court thus concluded that Tapia was employed by Ohlson at the time of her injury, and her only recourse was with the exclusive remedy afforded her by the Worker's Compensation Act. This, however, did not end the court's analysis. Because Tapia's injury allegedly occurred as a result of horseplay or an intentional act, the court was required to determine whether she was provided with an exception to the exclusive remedy statute, which will be discussed in greater detail in Part X.B.[162]

Lest there be any doubt that all future challenges to a trial court's jurisdiction based upon the exclusive remedy provision of the Act should be raised in terms of a Trial Rule 12(B)(1) motion to dismiss, two subsequent decisions in 1995 followed the *Tapia* pretrial procedure analysis.[163]

3. U.S. Metalsource v. Simpson.—In *U.S. Metalsource,* Simpson was a truck driver employed by Whiteford National Lease ("Whiteford"). Simpson, on behalf of Whiteford, hauled steel exclusively for U.S. Metalsource for nearly two years until he was injured while trying to move a load of steel on his truck. U.S. Metalsource defended Simpson's negligence claim on the jurisdictional grounds of the exclusive remedy statute, claiming that it was a coemployer of Simpson at the time of his injury. The trial court, however, denied U.S. Metalsource's motion for summary judgment.[164] As in *Tapia*, the *U.S. Metalsource* court also considered the trial court's decision under the standard of review for a motion to dismiss for lack of subject matter jurisdiction under Trial Rule 12(B)(1) rather than as a motion for summary judgment. Upon application of the *Fox* seven factor test,[165] the court found that U.S. Metalsource was Simpson's employer at the time of his injury and remanded to the trial court with instructions to dismiss the action for want of jurisdiction.[166]

4. Williams v. R.H. Marlin, Inc.—Finally, in October, 1995, the court reviewed a construction accident case involving borrowed servant and coemployment issues similar to the facts of *Riffle.* In *Williams v. R.H. Marlin,*

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160. *Id.*

161. *Id.*

162. *Id.*

163. Tippmann v. Hensler, 654 N.E.2d 821 (Ind. Ct. App. 1995); U.S. Metalsource Corp. v. Simpson, 649 N.E.2d 682 (Ind. Ct. App. 1995).

164. *U.S. Metalsource,* 649 N.E.2d at 684.

165. *Id.* at 685 (citing Fox v. Contract Beverage Packers, Inc., 398 N.E.2d 709, 711-12 (Ind. Ct. App. 1980)).

166. *Id.* at 685, 686.

Inc.,[167] Williams was employed by a subcontractor on a construction project. Similar to *Riffle*, the general contractor leased a crane and crane operator from R.H. Marlin, Inc. ("Marlin") to provide lifting services for all contractors and subcontractors on the project. Williams brought a negligence action against Marlin, its crane operator and others after being injured when a crane basket in which he was riding was dropped.[168] Again as in *Riffle*, summary judgment motions were filed alleging exclusive jurisdiction of the Board because the crane operator was the borrowed servant of Williams's employer and thereby a coemployee of Williams. The trial court agreed and ruled that it was without jurisdiction in light of the exclusive remedies of the Worker's Compensation Act.[169]

The *Williams* decision is significant in that, unlike *Riffle*, the *Williams* court applied the Trial Rule 12(B)(1) motion to dismiss standard of review rather than a summary judgment standard of review.[170] Moreover, the *Williams* court also employed the seven factor *Fox* test utilized by *Tapia* and *U.S. Metalsource*.[171] Unlike the result in *Tapia* and *U.S. Metalsource*, however, the *Williams* court reversed the trial court's ruling that it lacked subject matter jurisdiction, finding that Williams's employer was not the special employer of the crane operator, and, because Williams and the crane operator were not coemployees, Williams' negligence action was not barred by the exclusivity provision of the Act.[172] With the freedom to weigh the evidence under a Trial Rule 12(B)(1) motion to dismiss standard of review, the *Williams* court undertook an exceedingly thorough fact-sensitive analysis in applying the *Fox* seven factor test as set forth in *Hale v. Kemp*.[173] In this case, however, the fact-sensitive analysis yielded no immunity from suit for the crane operator because he was not deemed a coemployee of Williams, and Williams therefore established jurisdiction with the trial court.[174]

Given these recent decisions, it is clear that any challenges to a trial court's jurisdiction based upon the exclusive remedy provision of the Worker's Compensation Act must be treated by the trial court as a motion to dismiss under Trial Rule 12(B)(1), even if raised as a motion for summary judgment. Obviously, this provides the trial court great flexibility in considering and weighing what may otherwise be disputed facts. Importantly, although a defendant seeking to avoid the trial court's jurisdiction as a coemployer or coemployee under the exclusive remedy statute usually carries the burden of proof, that burden shifts to the plaintiff when the action is properly before the court as a motion to dismiss for lack of subject matter jurisdiction.[175]

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167. 656 N.E.2d 1145 (Ind. Ct. App. 1995).
168. *Id.* at 1148-49.
169. *Id.* at 1149.
170. *Id.*
171. *Id.* at 1151 (citing Hale v. Kemp, 579 N.E.2d 63, 67 n.2 (Ind. 1991)).
172. *Id.* at 1150.
173. *Id.* at 1151-53.
174. *Id.* at 1153.
175. *Id.* at 1149 (citing Foshee v. Shoney's, Inc., 637 N.E.2d 1277, 1281 (Ind. 1994)); Tapia

B. Horseplay/Intentional Acts Exception to the Exclusive Remedy

1. Tapia v. Heavner.—It does not automatically follow that a tortfeasor may escape trial court jurisdiction through the exclusive remedy statute simply by establishing employer/employee or coemployee status.[176] In *Tapia*, as discussed above, the defendant Ohlson was able to establish an employer/employee relationship with Tapia, which would thereby typically invoke the exclusive remedy provision. However, Tapia's injury was caused when an individual, deemed by the court to be a coemployee, pulled a lever causing Tapia's chair to fall to the floor.[177] Accordingly, the court engaged in further analysis to determine whether the coemployee's actions amounted to horseplay that would remove him from the protection of the exclusive remedy provision of the Act. The court acknowledged that "[a] number of recent decisions have carved out an exception holding that where a co-employee engages in horseplay or various non-job related activities, he forfeits the immunity provided by the statute."[178] Under this line of cases, the intentional activity, or horseplay, of pulling a lever and causing Tapia's chair to drop would have been considered not in the course of employment and the individual perpetrating the activity would therefore not have been "in the same employ" as Tapia for purposes of the exclusive remedy provision of the Worker's Compensation Act.[179]

The *Tapia* court declined to follow this line of cases, however, and instead adopted the test for determining whether individuals are "in the same employ" as set forth in *Weldy v. Kline.*[180] Pursuant to *Weldy*, the test is simply whether the defendant-tortfeasor would be entitled to worker's compensation benefits "under the same or similar circumstances."[181] Thus, the *Tapia* court concluded that, because its analysis had deemed Tapia to be a coemployee of Heavner, the individual that caused her chair to drop, they were both in the same employ and otherwise identically situated. Therefore, the court concluded that, in a reverse situation, Heavner would likewise have been entitled to worker's compensation benefits as was Tapia.[182] Without further consideration of the horseplay

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v. Heavner, 648 N.E.2d 1202, 1205-06 (Ind. Ct. App. 1995) (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1287 (Ind. 1994)).

176. *Tapia,* 648 N.E.2d at 1207 (citing Burke v. Wilfong, 638 N.E.2d 865 (Ind. Ct. App. 1994)).

177. *Id.* at 1205.

178. *Id.* at 1207 (citing Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631 (Ind. Ct. App. 1989); Seiler v. Grow, 507 N.E.2d 628 (Ind. Ct. App. 1987); Martin v. Powell, 477 N.E.2d 943 (Ind. Ct. App. 1985)); *see also supra* note 30.

179. *Tapia*, 648 N.E.2d at 1207-08 (citing *Fields,* 540 N.E.2d at 637).

180. *Id.* at 1208 (citing Weldy v. Kline, 616 N.E.2d 398 (Ind. Ct. App. 1993)).

181. *Id.*

182. *Id.* Following her injury, Tapia filed a claim for worker's compensation against her general employer, Standard Life, and received worker's compensation benefits from Standard Life's insurance carrier. *Id.* at 1205.

allegations, the court deemed Heavner to be in the same employ as Tapia and thereby entitled to immunity from Tapia's negligence action by way of the exclusive remedy statute. The court remanded with direction to dismiss Tapia's claim for lack of subject matter jurisdiction.[183]

2. Tippmann v. Hensler.—As already discussed above in Part I.B., the court again considered the horseplay/intentional act exception to a coemployee's immunity from suit in *Tippmann v. Hensler.*[184] In *Tippmann,* there was no apparent dispute that the defendant, Tippmann, and Hensler were coemployees. Both worked for the same company, and while on a work break Tippmann, Hensler and other employees gathered in a paint booth where paint guns were typically test fired. The employees fired paint guns at the ceiling, but Tippmann fired a paint gun that struck Hensler's eye, causing his injury.[185]

Hensler filed a worker's compensation claim and received benefits as a result of the injury to his eye. Hensler thereafter filed a complaint against Tippmann alleging negligence or intentional conduct, apparently attempting to avoid the exclusive remedy provision of the Worker's Compensation Act that would otherwise afford Tippmann immunity from Hensler's action.[186] Tippmann filed a summary judgment motion on the basis of the exclusive remedy provision, but the trial court denied Tippmann's motion in light of what it deemed to be genuine issues of material fact, including whether the parties were engaged in horseplay, whether the parties were in the same employ, and whether Tippmann's actions were intentional.[187] As in *Williams*, *U.S. Metalsource*, and *Tapia*, the *Tippmann* court acknowledged that the proper procedural vehicle for challenging the trial court's subject matter jurisdiction was through a motion to dismiss rather than a motion for summary judgment and analyzed the case accordingly.[188]

In analyzing the trial court's ruling, the court referenced the exclusivity provision contained in Indiana Code section 22-3-2-6, followed by what may be described as the exception to the Worker's Compensation Act's exclusive remedy provision.[189] Essentially, to the extent that an employee's injury is caused by an

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183. *Id.*

184. 654 N.E.2d 821 (Ind. Ct. App. 1995).

185. *Id.*

186. *Id.* at 823-24.

187. *Id.* at 823.

188. *Id.* at 824.

189. IND. CODE § 22-3-2-13 (1993) contains what has been described as an exception to the exclusive remedy statute in the following provision:

> [W]henever an injury or death, for which compensation is payable under Chapters 2 through 6 of this article shall have been sustained under circumstances creating in *some other person than the employer and not in the same employ* a legal liability to pay damages in respect thereto, the injured employee or his dependents, in case of death, may commence legal proceedings against the other person to recover the damages notwithstanding the employer's or the employer's compensation insurance carrier's payment of or liability to pay compensation under Chapters 2 through 6 of this article.

Id. (emphasis added).

individual that is "not in the same employ" as the injured employee, the Worker's Compensation Act allows a negligence action to be brought against such individuals.[190] As in *Tapia,* the *Tippmann* court also relied upon the *Weldy* test for determining whether individuals are in the same employ.[191] Applying this test, the court concluded that Tippmann and Hensler were in the same employ because they were both participating in a regularly-scheduled work break when the accident occurred. This "support[ed] the conclusion that had Tippmann been injured under the same circumstances, he would have been able to obtain worker's compensation benefits to the same extent as Hensler."[192] The court went on, however, to analyze the horseplay-related incident in terms of the "arising out of" and "in the course of" employment concepts, as discussed above in Part I.B.

The court acknowledged that a work-related injury resulting from horseplay may be deemed compensable when the employer acquiesces to such activity and it thereby becomes a condition of employment, but, when the injured employee actively participates in the horseplay, worker's compensation benefits will be denied because active participation is considered an intervening cause.[193] Thus, the court remanded the case to the trial court with instructions to make a finding of fact as to whether Hensler actively participated in the horseplay or was simply an innocent victim.[194]

The court reasoned that, if Hensler were deemed to be an innocent victim of the horseplay, he would be subject to the exclusive jurisdiction provision of the Worker's Compensation Act and the trial court would have no jurisdiction to hear his case. On the other hand, if the trial court found that Hensler was an active participant in the horseplay, the injury would not be deemed "in the course of his employment and the provisions of the Act [would] not apply."[195] Presumably, then, if Hensler was an innocent victim, his only remedy would be the worker's compensation benefits that he had already received as the trial court would be denied jurisdiction to hear his negligence claim under the exclusive remedy statute. If, however, Hensler was found to have been an active participant, the exclusive remedy provision of the Act would not apply, and Hensler would be allowed to proceed with his negligence claim against Tippmann, although his award of worker's compensation benefits totaling $19,983.60 would have been improper.[196]

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190. *Tippmann*, 654 N.E.2d at 824 (citing Northcutt v. Smith, 642 N.E.2d 254, 256 (Ind. Ct. App. 1994); IND. CODE § 22-3-2-13 (1993)).

191. The *Weldy* test is simply whether the defendant-tortfeasor would also be entitled to worker's compensation benefits if hers and the injured employee's circumstances were reversed. *Id.* at 825 (citing Tapia v. Heavner, 648 N.E.2d 1202, 1208 (Ind. Ct. App. 1995); Northcutt v. Smith, 642 N.E.2d 254, 256 (Ind. Ct. App. 1994); Weldy v. Kline, 616 N.E.2d 398, 403 (Ind. Ct. App. 1993)).

192. *Id.*

193. *Id.* at 826 (citing *Weldy*, 616 N.E.2d at 405).

194. *Id.*

195. *Id.*; *see also supra* note 30.

196. *Tippmann*, 654 N.E.2d at 823. "Active participation is effectively an intervening cause

The dissent raised an interesting point in this regard. Essentially, the dissent noted that, because Hensler had already successfully prosecuted his claim for worker's compensation benefits, his claim against Tippmann should have been dismissed by the trial court for lack of jurisdiction.[197] Stated another way, it would seem that a remand for a factual finding as to Hensler's active participation, or lack thereof, was unnecessary in light of the fact that he had been awarded benefits under the Worker's Compensation Act. It is implicit, pursuant to *Weldy*, that, had Hensler actively participated, he would not have been awarded benefits.[198] This approach seems to be implied by the decision of the *Tapia* court in that Tapia, like Hensler, was awarded worker's compensation benefits, and, upon finding that Tapia and the tortfeasor were in the same employ pursuant to *Weldy*, the court simply remanded with direction to dismiss for lack of subject matter jurisdiction, not to determine whether Tapia actively participated in the horseplay.[199] The Indiana Supreme Court granted Hensler's petition for transfer on January 17, 1996, although its opinion has not been rendered as of this writing.[200] It remains to be seen whether the issues raised in Judge Garrard's dissent will be resolved on transfer.

C. Exclusive Remedy Statute of the Worker's Compensation Act: Type of Claim and Class of Claimant Analysis

Two cases were decided in 1995 involving an analysis of the exclusive remedy statute as it relates to specific types of injuries claimed and to a specific class of claimant.

1. Terrell v. Rowsey.—In *Terrell v. Rowsey*,[201] Terrell brought an action against his employer, his supervisor, and his coemployees following his termination after being caught drinking beer in his employer's parking lot in violation of company policy. Terrell alleged that his supervisor "broke and entered his car and trespassed upon his car . . . and that as a result of [his

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and this court has consistently *denied compensation* to an injured employee who so participates." *Id.* at 826 (emphasis added) (citing *Weldy*, 616 N.E.2d at 405).

197. *Id.* (Garrard, J., dissenting).

198. *See Weldy*, 616 N.E.2d at 404.

199. Tapia v. Heavner, 648 N.E.2d 1202, 1208 (Ind. Ct. App. 1995).

200. The appellee's petition to transfer cites the following as the basis for its petition:

> The opinion of the court of appeals in this case is in error in that it conflicts with numerous other opinions of the Indiana Court of Appeals as well as contravening recent strong *dicta* of the Indiana Supreme Court as follows: (a) Martin v. Powell, (1985) Ind. App., 447 N.E.2d 943, *trans. denied* -- in which the court of appeals held that "in the same employ" for purposes of co-worker immunity under the Indiana Worker's Compensation Act (the "Act") requires the defendant co-worker to be acting within the course of his employment at the time the plaintiff suffers a compensable injury . . . .

Tippmann v. Hensler, No. 02503-9603-CV-201 (Ind. Jan. 17, 1996) (appellee's petition to transfer).

201. 647 N.E.2d 662 (Ind. Ct. App. 1995).

supervisor's] tortious misconduct, Terrell suffered embarrassment, defamation and loss of quiet enjoyment of his property."[202] The court affirmed the trial court's judgment in favor of Terrell's employer, supervisor and coemployees, but in so doing noted that the trial court erroneously found that it was without jurisdiction over Terrell's action in light of the exclusive remedy statute. The court stated that, because Terrell's claimed injuries of defamation, embarrassment and loss of quiet enjoyment of property were not physical and did not represent loss of physical function, they were not the type of injuries covered under the Worker's Compensation Act. Thus, the exclusive remedy statute did not apply to remove the case from the jurisdiction of the trial court.[203]

2. Ransburg Industries v. Brown.—Possibly the most interesting case decided in 1995 in the area of exclusive jurisdiction involved a case of first impression in Indiana. In *Ransburg Industries v. Brown*,[204] the court was faced with resolving the issue of whether the exclusive remedy statute bars a claim for prenatal injuries inflicted in the work place.[205] An action was brought against defendant Ransburg Industries ("Ransburg") by Rebecca and Brett Brown (the "Browns") after the Browns' son Brandon died on the day of his birth. The Browns alleged that Brandon's death was caused when Mrs. Brown fell ill after inhaling fumes while painting floors for Ransburg during the first trimester of her pregnancy. The trial court denied Ransburg's motion for summary judgment on grounds that the injuries causing Brandon's death did not invoke the exclusive remedy provision of the Worker's Compensation Act.[206]

The court again noted that the proper procedural vehicle for attacking the trial court's jurisdiction was not through a motion for summary judgment, but rather through a motion to dismiss pursuant to Trial Rule 12(B)(1).[207] The court then proceeded to review the trial court's decision as though it were based upon the denial of a motion to dismiss for lack of subject matter jurisdiction rather than a denial of a motion for summary judgment.[208] Because this was a case of first impression, the court sought guidance from other jurisdictions that considered the issue of prenatal injury in the worker's compensation arena.[209]

Essentially, the issue as to the applicability of the exclusive remedy statute was resolved by determining whether Brandon's claim against Ransburg was independent or derivative of Mrs. Brown's injury. The court first rejected

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202. *Id.* at 664.

203. *Id.* at 665 (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994)).

204. 659 N.E.2d 1081 (Ind. Ct. App. 1995).

205. *Id.* at 1082.

206. *Id.*

207. *Id.* at 1082-83 (citing *Perry*, 637 N.E.2d at 1286; Mannon v. Howmet Transp. Serv., Inc., 645 N.E.2d 1135, 1136 (Ind. Ct. App. 1995)).

208. *Id.* at 1083.

209. *Id.* (citing Thompson v. Pizza Hut of America, Inc., 767 F. Supp. 916 (N.D. Ill. 1991); Namislo v. Akzo Chemicals, Inc., 620 So. 2d 573 (Ala. 1993); Pizza Hut of America, Inc. v. Keefe, 900 P.2d 97 (Colo. 1995); Cushing v. Timesaver Stores, Inc., 552 So. 2d 730 (La. Ct. App. 1989); Bell v. Macy's California, 261 Cal. Rptr. 447 (1989)).

Ransburg's reliance upon a California case in which the court ruled that the child's injury was derivative from the employee's injury when the child's injury resulted from the employer's delay in securing medical attention for the pregnant employee.[210] The *Ransburg* court recognized that no other jurisdiction had followed the California analysis and turned instead to persuasive rationale from other jurisdictions.[211]

The common thread running through the cases from other jurisdictions considered by the *Ransburg* court was the recognition that the claim of the child was independent from any injury or claim of the employee-mother. In *Thompson v. Pizza Hut of America, Inc.*,[212] the employee's child was born with severe birth defects after the pregnant employee was exposed to, among other fumes, carbon monoxide as a result of a three day failure of the employer's ventilation system. Like Ransburg, the employer in *Thompson* also defended on grounds that the exclusive remedy provision of the Illinois worker's compensation laws "applied because the child's injury [was] derived from the injury suffered by the mother in the course of her employment."[213] The Illinois court, however, recognized a distinction between those cases in which the exclusive remedy provision of the Illinois worker's compensation laws worked to bar claims of spouses and children flowing from the employee's injury, such as loss of consortium claims, and those claims brought by the child based upon her independent prenatal injuries.[214]

The *Ransburg* court found the reasoning of *Cushing v. Time Saver Stores, Inc.*,[215] to be most persuasive in analyzing the distinction between a derivative or independent cause of action by a child injured in utero. In *Cushing*, an employee-mother suffered an injury after falling from a stack of boxes. The fall caused her child to be born with severe birth defects.[216] The *Cushing* court brought the distinction between derivative and independent actions out of the theoretical vacuum with the following analysis:

> The Act itself and all jurisprudence construing its various provisions, up to this time, have been focused on injuries to *employees*, and resultant losses by them and certain of their family members, based on the injuries *to the employees*. With regard to the losses of the family members, these might be economic, such as loss of support because the injured employee was no longer coming home with a paycheck, or they might be intangible, such as loss of consortium because the injured employee was no longer there to participate in family life. However, these losses, while rightfully termed "separate and distinct" and "independent" from those injuries sustained by the employee, always hinged upon the injuries of the

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210. *Id.* (citing *Bell*, 261 Cal. Rptr. at 454-55).
211. *Id.*
212. 767 F. Supp. 916 (N.D. Ill. 1991).
213. *Ransburg*, 659 N.E.2d at 1083 (citing *Thompson*, 767 F. Supp. at 918).
214. *Id.*
215. 552 So. 2d 730 (La. Ct. App. 1989).
216. *Ransburg*, 659 N.E.2d at 1084 (citing *Cushing*, 552 So. 2d at 731).

> employee. Because Dad or Mom suffered an injury, the family suffered a loss *based on that injury*. Thus, the claims of the family members were derivative of the employee's injury, even though the language utilized in the cases recognized an individual loss sustained by each family member, albeit one for which no claim could be asserted.
>
> Such is not the case in this instance. . . . Here, the employee's child has alleged injuries which are in no way derivative of the mother's injury. Whether Mom is there to continue bringing home a paycheck or to participate in the child's life has no relevance to this child's alleged brain damage.[217]

With this guidance from other jurisdictions, the *Ransburg* court next analyzed the facts of the case under Indiana law, first noting that the Indiana Supreme Court had previously recognized a cause of action based upon a pre-conception tort.[218] The *Ransburg* court rejected the employer's argument that Brandon's injury and death were derivative from the mother because the child was exposed to the harmful fumes through Mrs. Brown. Relying on *Cushing*, the *Ransburg* court noted that "the inquiry of whether a claim is derivative focuses not on how the injury occurred but rather on whether the claimed damages are based upon the employee's injury."[219]

The court concluded that the Browns' claim was based solely upon the injury incurred by Brandon and was in no way dependent on Mrs. Brown's claim.[220] The court thus reasoned that the wrongful death claim of Brandon, unlike a loss of consortium claim, was not derivative of the mother's claim and was therefore not barred by the exclusive remedy provision of the Worker's Compensation Act.[221] In a footnote, the court acknowledged a rather creative argument by Ransburg that the state tort liability should be preempted by Title VI of the Civil Rights Act because Ransburg would be prevented from implementing a gender-based fetal protection policy, but found that the facts of *Ransburg* did not indicate that Ransburg was prevented from complying with both federal and state law requirements.[222] A petition for transfer was filed on May 3, 1996, but as of this writing the Indiana Supreme Court has yet to take action on the same. Thus, the *Ransburg* decision indicates that if a child injured in utero can demonstrate an independent cause of action, he or she should be allowed to proceed with a negligence claim against the employer of his or her mother.

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217. *Id.* (citing *Cushing*, 552 So. 2d at 731-32).

218. *Id.* (citing Walker v. Rinck, 604 N.E.2d 591 (Ind. 1992)).

219. *Id.* at 1085.

220. *Id. But see* Nelson v. Denkins, 598 N.E.2d 558, 563 (Ind. Ct. App. 1992) ("A cause of action for loss of consortium derives its viability from the validity of the claim of the injured spouse against the wrongdoer.").

221. *Ransburg*, 659 N.E.2d at 1085-86.

222. *Id.* at 1086 n.7.

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ARTICLE

THE JUSTIFICATION OF PHYSICIAN-ASSISTED DEATHS

TOM L. BEAUCHAMP*

INTRODUCTION

Decisions on physician-assisted suicide have recently been handed down by the Ninth and Second Circuit Court of Appeals.[1] These decisions are the latest developments in a rapidly unfolding legal history in which a consensus has been reached that no criminal liability exists for withholding or withdrawing a life-sustaining treatment when physicians are directed to do so by a patient or an authorized surrogate.[2] Given that there is a moral and legal right to refuse a life-sustaining treatment and that suicide has been decriminalized,[3] it might seem that patients and physicians are at liberty to reach an agreement about how death will occur, as the Ninth and Second Circuits' decisions faintly suggest. However, the

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This Article was the basis of Professor Beauchamp's McDonald-Merrill-Ketcham Lecture presentation to faculty and other professionals on November 17, 1994 at the Indiana University School of Law—Indianapolis.

1. Compassion in Dying v. State of Washington, No. 94-35534 (9th Cir. filed March 6, 1996); Quill v. Vacco, No. 95-7028 (2d Cir. April 6, 1996).

2. Recent legal history and legal complexities are thoroughly treated in ALAN MEISEL, THE RIGHT TO DIE (1993). *See also* Alan Meisel, *The Legal Consensus about Forgoing Life-Sustaining Treatment: Its Status and Its Prospects*, 2 KENNEDY INST. ETHICS J. 309 (1992); Robert F. Weir & Larry Gostin, *Decisions to Abate Life-Sustaining Treatment for Nonautonomous Patients*, 264 JAMA 1846 (1990).

3. ALLEN BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 85, 90-93, 332-36 (1989); Kate E. Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929 (1987).

rule against *actively causing* the death of patients is among the most powerful prohibitions in law and medicine, and it severely restricts what patients and physicians are permitted to choose as a means to death.

Many writers in medical ethics and law are now questioning this traditional prohibition, using some of the same arguments presented in the two circuit court opinions.[4] They propose reforms that extend the scope of liberty rights and introduce more flexibility in the ways persons who are seriously or terminally ill can legally die. A few legal developments prior to the circuit court opinions have encouraged these proposals for reform. Among the most striking examples was the Canadian Supreme Court's decision in the case of Sue Rodriguez, who had been diagnosed with amyotrophic lateral sclerosis (Lou Gehrig's Disease) and had petitioned the Court to allow her the option of physician-assisted suicide. She attempted to invalidate section 241 of the Criminal Code of Canada, which prohibits physician-assisted suicide. The Court did not find in her favor, but several Justices delivered opinions that provided moral support for Rodriguez's goal of dying with a physician's direct assistance.[5] A handful of legal developments in the United States has likewise suggested that prohibitions of assisted suicide are unconstitutional,[6] that certain acts of direct assistance in dying do not constitute murder or manslaughter,[7] and that a physician's writing of a

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4. Diane E. Meier, *Doctor Attitudes and Experiences with Physician-Assisted Death*, *in* PHYSICIAN-ASSISTED DEATH 5-24 (James M. Humber et al. eds., 1994); David Orentlicher, *Physician-Assisted Dying: The Conflict with Fundamental Principles of American Law*, *in* MEDICINE UNBOUND: THE HUMAN BODY AND THE LIMITATIONS OF MEDICAL INTERVENTION 256 (Robert H. Blank et al. eds., 1994).

5. Rodriguez v. Attorney General of Canada, 3 S.C.R. 519 (Can. 1993) (on appeal from British Columbia Court of Appeal, Rodriguez v. British Columbia (Attorney General), B.C.J. No. 641 (Q.L.) (B.C.C.A.) (1993)). In early 1994 Sue Rodriguez killed herself with the assistance of an anonymous physician.

6. Compassion in Dying v. State of Washington, 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995). The District Court's opinion was influenced by Planned Parenthood v. Casey, 505 U.S. 833 (1992):

> This court finds the reasoning in Casey instructive and almost prescriptive on the latter issue. Like the abortion decision, the decision of a terminally ill person to end his or her life 'involves the most intimate and personal choices a person may make in a lifetime' and constitutes a 'choice central to personal dignity and autonomy.'

Compassion in Dying, 850 F. Supp. at 1459. *See also*, Stephanie B. Goldberg, *Death by Choice: Two Courts Clash on Constitutional Right to Assisted Suicide*, 80 A.B.A. J., July 1994, at 73; G. Steven Neeley, *The Constitutionality of Elective and Physician-Assisted Death*, *in* PHYSICIAN-ASSISTED DEATH 47-73 (James M. Humber et al. ed., 1994); Todd D. Robichaud, *Toward a More Perfect Union: A Federal Cause of Action for Physician Aid-in-Dying*, 27 U. MICH. J.L. REF. 521 (1994).

7. *See* Hobbins v. Attorney General, 518 N.W.2d 487 (Mich. Ct. App. 1994); Michigan v. Kevorkian, 517 N.W.2d 293 (1994); Michigan v. Kevorkian, Case No. CR-92-115190-FC (July 21, 1992). *See also* JACK KEVORKIAN, PRESCRIPTION MEDICIDE: THE GOODNESS OF PLANNED DEATH (1991); Michael J. Roth, Note, *A Failed Statute, Geoffrey Feiger, and the Phrenetic*

lethal prescription is legally permissible.[8]

These developments have encouraged many observers to think of the primary moral and legal questions about physician-assisted suicide and euthanasia as questions of *legalization*. Almost lost in the recent discussion is the fundamental issue regarding the justification of *individual acts* by physicians of killing and letting die. I will argue that certain acts by physicians of assisting persons in bringing about their deaths are morally justified forms of either euthanasia or physician-assisted suicide, but this argument will not be sufficient to justify the legalization of physician-assisted suicide or active euthanasia.[9] Defense of this conclusion requires that I first examine the meanings of "euthanasia" and "physician assisted suicide," as well as the meanings of "killing" and "letting die." After this conceptual clarification I will treat some related problems in the notion of causing death. Finally, I will treat forms of justification that have been offered for and against acts of physician assistance in dying.

I. THE LANGUAGE OF "EUTHANASIA" AND "PHYSICIAN-ASSISTED SUICIDE"

Discussion of these subjects has been thwarted by conceptual confusion that has surrounded the terms *euthanasia* and *physician-assisted suicide*.[10] I begin by defining these terms.

Originally derived from Greek roots for "good death," the term "euthanasia" now has two general meanings: (1) the act or practice of painlessly putting to death those who suffer from terminal or severely painful conditions (active euthanasia); and (2) intentionally forbearing from preventing death in those who suffer from terminal or severely painful conditions (passive euthanasia). The second meaning emerged only after technology made it possible to prolong the lives of persons with little hope of recovery.[11] The requirements of a terminal or

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Physician: Physician-assisted Suicide in Michigan and a Patient-oriented Alternative, 28 VAL. U. L. REV. 1415 (1994).

8. Oregon Legislature Measure No. 16., Oregon Death with Dignity Act (1994), approved by voters in a 1994 referendum. Under this Act, terminally ill adults are allowed to obtain lethal drugs from physicians in order to hasten death and escape unbearable suffering. This initiative, once scheduled to become law, was permanently enjoined by a federal district court. *See* Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995), Lee v. State, 869 F. Supp. 1491 (D. Or. 1994); Alexander M. Capron, *Sledding in Oregon*, HASTINGS CENTER REP., Jan.-Feb. 1995, at 34; Courtney S. Campbell, *When Medicine Lost its Moral Conscience: Oregon Measure 16*, BIOLAW: A LEGAL AND ETHICAL REPORTER ON MEDICINE, HEALTH CARE, AND BIOENGINEERING, Special Sections 2(1), Jan. 1995, at S1-S16; Courtney S. Campbell et al., *Conflicts of Conscience: Hospice and Assisted Suicide*, HASTINGS CENTER REP., May-June 1995, at 36.

9. On the many distinct problems of legalization and regulation, see Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1 (1996).

10. *See* Robert F. Weir, *The Morality of Physician-Assisted Suicide*, 20 LAW MED. & HEALTH CARE 116 (1992).

11. *See* Ezekiel J. Emanuel, *The History of the Euthanasia Debate in the United States and*

severely painful condition have also been dropped in many proposed definitions of euthanasia on grounds that some persons suffer severely from conditions that are not terminal and may not cause them pain.[12]

The two general meanings can be consolidated into a single definition, as follows: Euthanasia occurs if and only if: (1) The death of a person is intended by at least one other person who is either the cause of death or a causally relevant factor in bringing about the death; (2) the person killed is terminally ill, acutely suffering, or irreversibly comatose, which alone is the primary reason for intending the person's death; and (3) the means chosen to produce the death are as painless as possible, or there is a sufficient moral justification for choosing a more painful method.[13]

If a person capable of voluntary action requests the termination of his or her life under these three conditions, the action is *voluntary* euthanasia. If the person is not mentally competent to make an informed request, the action is *nonvoluntary* euthanasia. Both are distinguished from *involuntary* euthanasia, a designation restricted to a person capable of informed choice, but who has not requested euthanasia. Involuntary euthanasia is universally condemned and plays no role in current moral and legal controversies, but the first two forms are actively under discussion.

Active and *passive* euthanasia were distinguished once the intentional omission of life-sustaining treatment came to be categorized as euthanasia. When this distinction is combined with the voluntary-nonvoluntary distinction, four general categories of euthanasia emerge, of which the second and third types have been the focus of discussion.

1. Voluntary passive euthanasia
2. Nonvoluntary passive euthanasia
3. Voluntary active euthanasia
4. Nonvoluntary active euthanasia

"Physician-assisted suicide" is often treated as a form of voluntary active euthanasia[14] on grounds that the voluntary choice of the patient makes the death a suicide and the physician-assistance is active rather than passive. However, the concepts of voluntary active euthanasia and physician-assisted suicide should be

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Britain, 121 ANNALS INTERNAL MED. 793 (1994); W. B. Fye, *Active Euthanasia: an Historical Survey of its Conceptual Origins and Introduction into Medical Thought*, 52 BULL. HIST. MED. 492 (1978).

12. LAW REFORM COMMISSION OF CANADA, EUTHANASIA, AIDING SUICIDE AND CESSATION OF TREATMENT (1982); John Lachs, *Active Euthanasia*, 1 J. CLINICAL ETHICS 113 (1990); Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, 103 ETHICS 250 (1993).

13. This account is elaborated in Tom L. Beauchamp & Arnold Davidson, *The Definition of Euthanasia*, 4 J. MED. & PHIL. 294 (1979). *Contra* Michael Wreen, *The Definition of Euthanasia*, 48 PHIL. & PHENOMENOLOGICAL RES. 637 (1988).

14. *See* AMA Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229 (1992). This pronouncement seems to treat both as straightforward cases of prohibited killing.

kept distinct. "Euthanasia" does not require a *physician* to bring about the death, and "physician-assisted suicide" does not require that the person who dies be acutely suffering or that the person's condition forms the reason for the suicide or for assisting in suicide. There is also no conceptual requirement in physician-assisted suicide that the means chosen must be as painless as possible.[15]

A few courts and commentators have suggested that assisted suicide occurs when physicians authorize the withdrawal or withholding of treatment from patients at the patients' requests. They consider this suicide because the patient intends to bring about his or her death. Others see no suicidal intent in these cases, only an intention to relieve suffering.[16] This apparent disagreement often seems to turn on the precise nature of the actor's intentions.[17] In the *Cruzan* case, Justice Antonin Scalia argued, understandably, that the withdrawing or withholding of treatment does sometimes constitute suicide.[18] He apparently believes that *any* means productive of death can be arranged to the end of killing oneself (even if one is terminally ill and death is imminent, and even if the causes of death are natural). Stopping a treatment is not relevantly different from stabbing oneself with a knife if the intention to end life and the reason for putting an end to life are relevantly similar. Thus, suicidal intent could be present in any circumstance of a patient's intentional refusal of lifesaving treatment. Patients of this description who refuse treatment commit suicide, and physicians assist them in suicide, whether intentionally or not. (This point raises several questions about what a patient must intend and what a physician must intend in cases of physician-assisted suicide; but I will not explore these questions here.[19])

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15. For different approaches and a few contrasting analyses, see Glenn C. Graber & Jennifer Chassman, *Assisted Suicide is Not Voluntary Active Euthanasia, but It's Awfully Close*, 41 J. AM. GERIATRICS SOC'Y 88 (1993); James C. Maher et al., *VAE versus Assisted Suicide [Letters to the Editor]*, 41 J. AM. GERIATRICS SOC'Y 583 (1993); Franklin G. Miller et al., *Regulating Physician-Assisted Death*, 331 NEW ENG. J. MED. 119 (1994); David T. Watts & Timothy Howell, *Assisted Suicide is Not Voluntary Active Euthanasia*, 40 J. AM. GERIATRICS SOC'Y 1043 (1992); Weir, *supra* note 10.

16. On the nature and role of suicidal intent and related difficulties in analyzing the concept of suicide, see SUICIDE: THE PHILOSOPHICAL ISSUES (Margaret Pabst Battin et al. eds., 1980); Tom L. Beauchamp, *Suicide*, *in* MATTERS OF LIFE AND DEATH: NEW INTRODUCTORY ESSAYS IN MORAL PHILOSOPHY 707 (Tom Regan ed., 1993); David J. Mayo, *The Concept of Rational Suicide*, 11 J. MED. & PHIL. 143 (1986). For the principal cases and an analysis, see Martha Alys Matthews, *Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment*, 75 CAL. L. REV. 707 (1987); Meisel, *supra* note 2. Two decisions that take the view that refusals of treatment are not suicides are *In re* Conroy, 486 A.2d 1209 (N.J. 1985), and Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

17. Ronald Dworkin, *The Right to Death*, *in* NEW YORK REVIEW OF BOOKS 14 (1991); Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857 (1992).

18. Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990) (Scalia, J., concurring).

19. For some suggestive comments on these themes focused on the scope of the *right* to refuse treatment, see N. Ann Davis, *The Right to Refuse Treatment*, *in* INTENDING DEATH 109-30

Moreover, many persons who unquestionably commit suicide are suffering and seek relief from that suffering; they do not seek death as an end in itself. This makes it difficult to distinguish suicides from treatment refusals on the basis of intention. Like typical suicides, patients who refuse treatment often intend to end their lives because of their grim prospects. Surprisingly, many judicial decisions maintain that refusals of treatment that satisfy these conditions are *not* suicides. These decisions may derive from the need to legitimate various forms of assistance that physicians provide when helping patients die by withholding treatment. The reason is that without the protections afforded by these precedent cases many common forms of assistance might be legally proscribed.

Assisted suicide and voluntary active euthanasia both involve assistance in bringing about another's death, but "assisted suicide," as this term will be used here, also requires that the person whose death is brought about be the ultimate cause of his or her own death (the final relevant link in a causal chain leading to death), whereas "voluntary active euthanasia" requires that the ultimate cause of one person's death be another person's action. As we will see, when physicians assist in or administer death to their patients, the physicians' *intentions* and the *causes* of death involved can make a decisive difference to both the classification and the evaluation of their acts. However, we need first to consider how the often invoked distinction between *killing* and *letting die* plays a role in these controversies.

II. THE LANGUAGE OF "KILLING" AND "LETTING DIE"

Those who defend the view that euthanasia and physician-assisted suicide are morally prohibited typically assume that acts of killing are impermissible and that a defensible distinction exists between killing and letting die.[20] However, this distinction has been difficult to explicate,[21] and it creates both moral and conceptual confusion because the right of autonomy that underlies allowing patients to die when they refuse treatment seems, in principle, to extend to a patient's choice of suicide or euthanasia.[22] The distinction is also of less value in practical contexts and public policy than is commonly assumed.[23] The problem

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(Tom L. Beauchamp ed., 1996).

20. *See* MARGARET PABST BATTIN, LEAST WORST DEATH 15-20 (1994).

21. *See* various articles in KILLING AND LETTING DIE (Bonnie Steinbock ed., 1980); and in INTENDING DEATH (Tom L. Beauchamp ed., 1996). *See also* H. M. Malm, *Killing, Letting Die, and Simple Conflicts*, 18 PHIL. & PUB. AFF. 238 (1989); McMahan, *supra* note 12, at 250-79.

22. *See generally* Kadish, *supra* note 17; George P. Smith, II, *All's Well That Ends Well: Toward a Policy of Assisted Rational Suicide or Merely Enlightened Self-Determination*, 22 U.C. DAVIS L. REV. 275 (1989).

23. *See* Donald G. Casswell, *Rejecting Criminal Liability for Life-shortening Palliative Care*, 6 J. CONTEMP. HEALTH L. & POL'Y 127 (1990); James F. Childress, *Non-Heart-Beating Donors: Are the Distinctions Between Direct and Indirect Effects and Between Killing and Letting Die Relevant and Helpful?*, 3 KENNEDY INST. ETHICS J. 203 (1993); Lawrence O. Gostin, *Drawing a Line Between Killing and Letting Die: The Law, and Law Reform, on Medically Assisted Dying*,

is illustrated by cases in which parents, surrogates, and physicians consider the forgoing of treatment for patients in instances of justified *letting die*, but critics accuse them of unjustified *killing*.[24] For example, Dr. Gregory Messenger, a dermatologist, was charged with manslaughter after he unilaterally terminated his premature (25 weeks gestation, 750 g.) son's life-support system in a Lansing, Michigan's neo-natal intensive care unit; he thought he had merely acted compassionately and allowed his son to die after a neonatologist had failed (he thought) to fulfill a promise not to resuscitate the infant.[25] Law and public policy have given physicians and parents little guidance about the permissible range of discretion in these non-life-support cases,[26] with consequent confusion about whether the act is one of killing or letting die.

Ordinary language, law, and traditional medical ethics give us no clear answer whether such cases are correctly described as "killing" or as "letting die." "Killing" does not entail either a wrongful act, a crime, or an intentional action. For example, persons are killed in accidental automobile collisions, even when the other driver was not at fault. In ordinary language, *killing* represents a set of related ideas whose central condition is causal action that brings about another's death (when existing conditions would otherwise have sustained the life). *Letting die* represents another family of ideas whose central condition is intentional avoidance of causal intervention so that disease, system failure, or injury causes death (when existing conditions would, without medical intervention, not have sustained the life). Law, medicine, ethics, and ordinary language all recognize that some forms of letting die constitute killing. As the Supreme Court of Washington put it, "the killing of a human being [can occur] by the act, procurement, or omission of another."[27] Killing by omission (or by abatement of treatment) and killing by commission also cannot be distinguished by intention, as both can be intentional.

If we are to retain some distinction between killing and letting die and use it to distinguish appropriate from inappropriate physician behavior, we need more precise meanings for these notions.[28] For example, the term "killing" could be

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21 J. L. MED. & ETHICS 94 (1993); Susan Kowalski, *Assisted Suicide: Where do Nurses Draw the Line?*, 14 NURSING & HEALTH CARE 70 (1993).

24. The classic case is presented *In re Treatment and Care of Infant Doe* (an Indiana case held in Monroe County Circuit Court). Contrast the conceptual argument in Bart Gruzalski, *Killing by Letting Die*, 90 MIND 91 (1981).

25. Howard Brody, *Messenger Case: Lessons and Reflections*, 5 ETHICS-IN-FORMATION 8 (1995); John Roberts, *Doctor Charged for Switching Off His Baby's Ventilator*, 309 BRIT. MED. J. 430 (1994); *Man Acquitted in Son's Death*, N.Y. TIMES, Feb. 4, 1995, at 10. In February 1995, Dr. Messenger was cleared by a jury in a lower court of manslaughter charges brought in 1994. For similar cases, see 17 LAW, MED. & HEALTH CARE 294-406 (1989) (a special issue devoted to the Linares case); *see also* Fred Barbash & Christina Russell, *The Demise of 'Infant . . .': Permitted Death Gives Life to an Old Debate*, WASH. POST, April 17, 1982.

26. Brody, *supra* note 25.

27. *In re* Colyer, 660 P.2d 738, 751 (Wash. 1983).

28. *See generally* Raanan Gillon, *Acts and Omissions, Killing and Letting Die*, 292 BRIT.

defined so that it is restricted entirely to circumstances in which one person *intentionally and unjustifiably* causes the death of another human being—a usage that limits and reconstructs the ordinary meaning of the term.[29] The term "killing" would then be morally loaded in such a way that *justified* acts of arranging for death in medicine logically could not be instances of killing; they would necessarily be cases of letting die. Under this *stipulative* definition of "killing," physicians do not kill when they justifiably remove a life-sustaining treatment in accordance with a patient's refusal of treatment, and patients do not kill themselves when they justifiably forgo treatment. However, this stipulative move to redefine "killing" evades rather than resolves the moral and conceptual problems.

In Parts I and II of this Article, I have been dealing with conceptual problems that surround terms and distinctions such as "euthanasia" and "physician-assisted suicide," "active" and "passive," and "killing" and "letting die." I have only touched the surface of these problems, though some will be discussed later. It deserves notice at this point that in many complex cases the elements of these notions are so intertwined as to almost defy neat classification of the case as falling under one or more of these terms, even when they are combined in expressions such as "voluntary active euthanasia." A case in point is the following:

> A bright, alert, elderly man with several different life-threatening illnesses sought counseling for what he hoped would be an approach to euthanasia. . . . A "new" symptom [suddenly] precipitated the possibility of major surgery, albeit with an awareness on all sides of the poor prognosis. Nonetheless, the patient pushed for the surgery, which resulted in his death. The patient achieved his wish by seducing his medical caregivers to unwittingly expedite his demise.[30]

This and many other complicated cases create doubt that a comprehensive and morally neutral analysis consistent with law and ordinary usage will be developed for the terms "killing" and "letting die." Nonetheless, I will start with the neutral assumption that the term "killing" refers only to certain acts of causing death and these acts are neither justified nor unjustified.

III. Problems in the Justification of Killing and Letting Die

If "killing" is justified under some conditions (for example, in cases of self-defense), the justifiability of any *particular* killing is an open question and we cannot assert without examining particular cases and justifications that a case of killing is morally worse than a case of letting die. That is, to correctly apply the

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MED. J. 126 (1986); McMahan, *supra* note 12.

29. For straightforward usages of "killing" as a moral notion entailing culpability, see Daniel Callahan, *When Self-Determination Runs Amok*, HASTINGS CENTER REP., Mar.-Apr. 1992, at 52; C. Everett Koop, *The Challenge of Definition*, HASTINGS CENTER REP., Jan.-Feb. 1989, Special Supplement 2.

30. Nathan Schnaper, *Surgery or Assisted Suicide*, 114 ANNALS INTERNAL MED. 995 (1991).

label "killing" or the label "letting die" to a set of events will not, by itself, determine whether an action is acceptable or unacceptable.[31] Killing will in most cases be worse that letting die, but such judgments will be contingent on the cases and cannot be reached through the meaning of the terms "killing" and "letting die." A particular act of killing, such as a callous murder, will generally be morally worse than a particular act of letting die, such as forgoing treatment for a dying and comatose patient; but some acts of letting die such as not resuscitating a patient who could easily be saved, but who has refused treatment because of a series of mistaken assumptions, also will be morally worse than particular acts of killing, such as mercy killing at the request of a seriously ill and suffering patient.

Nothing about killing or letting die, then, entails judgment about the wrongness or rightness of either type of action, or about the acceptability of the intentions of an actor who performs the actions. Rightness and wrongness depend on the justification underlying the action. Any judgment that an act of killing or letting die is justified or unjustified requires that something be known about the actor's intention or motive (whether it is benevolent or malicious, for example), about the patient's refusal of treatment or request of assistance, about the balance of benefits over burdens to the patient, and about the consequences of the act.

Some writers have tried to address these problems of justification through an account of the cause of death and causal responsibility for death.[32] They construe the forgoing of treatment as letting die, rather than killing, if and only if an underlying disease, system failure, or injury is the cause of death. Medical technology, in this account, merely delays the natural course of an underlying condition. When the technology is removed, a natural death occurs, because natural conditions do what they would have done if the technology had never been initiated.[33] The patient's affliction becomes the proximate cause of death, not the physician's, surrogate's, or patient's action, thus, neither homicide nor assisted suicide occurs. By contrast, killing occurs when an act of a person causes death: One acts appropriately in many cases of intentionally allowing a person to die (one is not the cause of death at all), but inappropriately when they intentionally kill.

To make this argument complete and plausible, I believe it must be added that the forgoing of treatment that allows a person to die must be a *justified* forgoing. The *justification of forgoing treatment* then becomes the centerpiece issue rather than the *causation of death* (that is, the particular causal route to death). What, then, justifies a forgoing of treatment?

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31. *Cf.* James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975). *See also* JAMES RACHELS, THE END OF LIFE: EUTHANASIA AND MORALITY (1986); Dan W. Brock, *Voluntary Active Euthanasia*, HASTINGS CENTER REP., Mar.-Apr. 1992, at 10.

32. *See In re* Estate of Greenspan, 558 N.E.2d 1194, 1203 (Ill. 1990); *In re* Conroy, 486 A.2d 1209, 1222-23 (N.J. Sup. Ct. 1985); *In re* Conroy, 464 A.2d 303 (N.J. Super. Ct. App. Div. 1983); *see also* BY NO EXTRAORDINARY MEANS pt. V, at 227 (Joanne Lynn ed., 1986); Daniel Callahan, *Vital Distinctions, Mortal Questions: Debating Euthanasia and Health Care Costs*, 115 COMMONWEAL 397 (1988).

33. Compare the general account in DANIEL CALLAHAN, THE TROUBLED DREAM OF LIFE ch. 2 (1993).

The mere fact that a natural cause will, if released, bring about death is not in itself sufficient to justify not treating someone. To see why, consider the following example: A disaffected employee of a hospital maliciously detaches a patient from a respirator. This detachment of the patient from the respirator is causally no different than the detachments by physicians that allow patients to die. The disaffected employee and the physician do not differ causally when they detach the respirator and allow someone to die. Therefore, some features in the circumstance other than forgoing treatment, disconnecting the respirator, and the presence of disease or injury must be considered to arrive at moral and legal conclusions about justifiable actions.

Just as the employee killed a patient, physicians who do the same thing also kill their patients, *unless* we introduce a condition about the justifiability of one person (the physician) forgoing treatment and the unjustifiability of the other person "forgoing" treatment. Without some distinguishing and justifying feature in the circumstances that renders their discontinuations of treatment justified, physicians cannot justifiably say, "We do not kill our patients, only the underlying diseases and injuries do," any more than the disaffected employee can say, "It was the disease, not me, that killed him." An account of killing and letting die restricted to forgoing treatment, disconnecting machines, and disease-caused death leads to the conclusion that either the employee did not kill the patient or that physicians always kill their patients when they die from such forgoing of treatment. To solve this problem we must provide a more plausible account of justified forgoing of treatment and justified actions that cause death.

To this end, we need an evaluative framework to determine which causal interventions and outcomes make a difference and what difference they make. The framework, rather than the bare causal facts, will point us to the *relevance* of the causal facts and will determine how we can and cannot properly make ascriptions of responsibility, culpability, liability, and the like.

IV. PROBLEMS IN THE CAUSATION OF DEATH

I have argued that whether an act is justified cannot be determined by the fact that it is a killing and that an independent justification is necessary. Many will resist this conclusion on grounds that killing and causing death are intrinsically unjustified acts.[34] In this Part, I will concentrate on this problem as an issue of causation (of death) and liability.

Causation in the law, unlike causation in other fields of causal inquiry, is structured to identify *causal responsibility* for an outcome. The "cause of death" in law assigns responsibility for death; the "cause of death" in science identifies causal facts as determined by causal laws. In law one could not assess causal responsibility for negative outcomes without a preexisting system of duties. Without an assigned duty, no causal responsibility exists; we could even say that in law no *causation* exists by human agents without an assignment of duties.

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34. *Cf.* Richard Doerflinger, *Assisted Suicide: Pro-choice or Anti-life?*, HASTINGS CENTER REP., Jan.-Feb. 1989, Special Supplement 16.

Therefore, if a physician has no duty to treat, forbearing to treat does not breach a duty and does *not cause death.* Authorized withdrawal of treatment is not an affirmative act:[35] It is not providing treatment when there is no legal duty to provide treatment. Indeed, there is a legal duty not to provide treatment. The physician's forbearance is not causally connected to the death. When no duty to treat exists, then preexisting disease, system failure, or injury is the proximate cause, and the physician escapes liability.[36] If a physician does have a duty to treat, omission of treatment breaches the duty and *causes death.*

This structuring of duties rests on evaluative judgments about permissible conduct, and these *value* judgments often control what appear to be *factual* judgments about the cause of death. That is, value judgments about justified and unjustified actions, rather than factual judgments, control judgments about what constitutes "killing" and how it differs from letting die; causal judgments do not determine what constitutes killing and letting die.[37] "Killing" thus functions more as an *evaluative* category than a *causal* category.[38]

This approach to causation helps to alleviate the fears of health professionals concerning legal liability, but it is neither the only way to think about causation nor an adequate account of the physician's duties. Here is an alternative way to think about causation:[39] In many cases a patient's death cannot plausibly be attributed entirely to natural causes; the intentional action of a physician, a patient, or both plays a central role. The patient's decision or the physician's action are causal factors that determine how and when death will occur. They may not be *proximate* causes under law,[40] but they are causes nonetheless. As Lawrence Gostin explains, "Withholding or withdrawing life sustaining treatment, such as abating technological nutrition, hydration or respiration, will cause death as surely

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35. Barber v. Superior Court, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983).

36. *In re* Estate of Greenspan, 558 N.E.2d at 1203.

37. Causal judgments are often structured through various forms of evaluative judgment (as well as by causal explanation) in both law and morals. *See* H. L. A. HART & A. M. HONORÉ, CAUSATION IN THE LAW (1959); Samuel Gorovitz, *Causal Judgments and Causal Explanations*, 62 J. PHIL. 695 (1965).

38. For an example of one author who straightforwardly uses "killing" as a moral notion entailing culpability, see Daniel Callahan, *When Self-Determination Runs Amok*, HASTINGS CENTER REP., Mar.-Apr. 1992, at 52.

39. *See* Dan W. Brock, *Forgoing Life-Sustaining Food and Water: Is it Killing?*, *in* BY NO EXTRAORDINARY MEANS 118 (Joanne Lynn ed., 1986); Raymond G. Frey, *Intention, Foresight, and Killing*, *in* INTENDING DEATH 72 (Tom L. Beauchamp ed., 1996); Raymond J. Devettere, *The Imprecise Language of Euthanasia and Causing Death*, 1 J. CLINICAL ETHICS 268 (1990); Kenneth F. Schaffner, *Recognizing the Tragic Choice: Food, Water, and the Right to Assisted Suicide II*, 16 CRITICAL CARE MED. 1063 (1988). These writers have variously used a but-for theory of causation, a contributory theory of causation, and an account of singular causal judgments to fill out their accounts.

40. From the law's perspective, these conditions might be viewed as incidental causes or conditions of the superior or controlling cause that qualifies as the proximate cause.

as a lethal injection."[41]

To exploit an example used by Chief Justice Rehnquist and Justice Scalia in the *Cruzan* case, when feeding tubes were removed from Nancy Cruzan and death occurred a few days later, it was implausible to argue that the cause of death for this comatose person was the injury sustained years before in an automobile accident.[42] The injury sustained in the accident was the motivating factor and perhaps the justifying reason for the action of removing the medical technology that sustains life, but was it the cause of the death that came to Nancy Cruzan? Even if it was *a* cause, was it the sole cause?[43]

The actions of physicians are in many (certainly not all) cases necessary parts of the sufficient conditions of death at the time and in the way the death occurs.[44] To withhold nutrition and hydration so that a patient dies is a necessary part of a sufficient condition of death at the time and in the way the death occurs. If the patient is suffering from conditions such as severe brain damage, cancer, or quadriplegia, these conditions are neither necessary nor sufficient conditions of death. They are not the cause of death as it occurs and when it occurs. If physicians are not legally responsible for their participation in this process, it is only because they are protected by a network of duties that does not require them to act and prevent the death, not because they have no causal role in the outcome. If this network of duties were to be altered, causal responsibility for outcomes would be correlatively altered.

To appreciate this point, consider an *unintentional* and *unjustified* action. Suppose a physician *mistakenly* removes a respirator from a quadriplegic patient who wanted to continue living and could have continued living for many years. We could not reasonably say, "The physician did not cause the patient's death; he only allowed the patient to die." By "letting" this patient die, he failed to discharge a duty and caused the patient's death. It would be preposterous in this case for the physician to protest a legal indictment by saying, "*I* did not kill him; the disease killed him. I merely allowed him to die." Except for being unintentional, this physician's act is the same act that a physician performs, intentionally and at the request of a patient or patient's family, in a standard case of "letting die." What the physician does is *causally* no different than what anyone would do if he or she removed a patient's life-support.

Generally, the motives of patients and physicians are proper, and both moral and legal justification exists for the action. Whether the motive is evil or noble, the act remains one of causing death. Courts have occasionally followed this path of reasoning and extended it to proximate causation and causal responsibility. For example, the Superior Court of New Jersey, Appellate Division, held in the *Conroy* case that removing the nasogastric tube from 84-year-old Claire Conroy would not be merely forgoing treatment. The court believed that her physicians

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41. Gostin, *supra* note 23.

42. Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990).

43. *See* Edward R. Grant & Cathleen A. Cleaver, *A Line Less Reasonable:* Cruzan *and the Looming Debate over Active Euthanasia*, 2 MD. J. CONTEMP. LEGAL ISSUES 99 (1991).

44. Brock, *supra* note 39; Schaffner, *supra* note 39.

were proposing to *dehydrate and starve* Conroy, which would constitute killing her. The court explained that the patient "would have been actively killed by independent means," a result the court held to be euthanasia.[45]

The Supreme Court of New Jersey later overturned this lower court ruling. It followed the dominant view in law and medicine that natural causes are responsible for the patient's death under these circumstances.[46] But was the lower court entirely wrong with its view of causation? Is the matter clear and settled? Are natural causes the *only* morally relevant type of causes? Are both natural causes and human causes at work in these cases?

In some difficult and controversial circumstances, both physician intervention *and* a relevant causal condition of disease, system failure, or injury are present. In a few cases, multiple causal conditions may be relevant, each forming an independent causal sequence sufficient to bring about death. That is, any one of several distinct sequences of causally linked events may be sufficient to cause death. To isolate a single event that causes death may not be possible because our concepts of causation in law and elsewhere are not sufficiently precise to allow us to isolate "the cause."[47]

In law, some of the problems regarding causation and killing can be eradicated through a determinate scheme of duties in which physicians or surrogates do not have a duty to provide or to continue the treatment. If no duty to treat exists, then questions of legal causation and liability do not arise. Would this strategy require that we altogether dispense with the language of "killing" and "letting die" in medical contexts, framing the issues exclusively in the language of optional and obligatory treatments? If so, the thesis would be unsatisfactory, because physicians can both kill and let die. All that the argument thus far forces us to reconsider is the precise foundation for determinations that physicians let die and kill. The foundation is simpler for letting die than many have thought, as we will now see.

V. Valid Refusals as the Justificatory Basis of Letting Die

The conceptual conditions of "letting die" are also the justifying conditions of letting die. A commonly held view is that "letting die" is to be defined as a matter of "ceasing useless treatments" after which patients die.[48] This account is highly misleading, but also revealing.

Consider what justifies a physician's act of forgoing treatment. The physician's forgoing is warranted by an *authoritative refusal of treatment* by a

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45. *In re* Conroy, 464 A.2d 303 (N.J. Super. Ct. App. Div. 1983).

46. *In re* Conroy, 485 A.2d 1209, 1224-25 (N.J. 1985).

47. Devettere, *supra* note 39; Schaffner, *supra* note 39; Benjamin Freedman, *The Titration of Death: A New Sin*, 1 J. Clinical Ethics 275 (1990).

48. Willard Gaylin et al., *Doctors Must Not Kill*, 259 JAMA 2139 (1988). It is sometimes added, as a condition, that the patients must be dependent on life-support systems. *See* Ronald E. Cranford, *The Physician's Role in Killing and the Intentional Withdrawal of Treatment*, in Intending Death 160 (Tom L. Beauchamp ed., 1996).

patient or authorized surrogate. It would be both immoral and illegal for the physician not to forgo treatment in the face of a competent, authoritative refusal. The presence of a competent, authoritative refusal of treatment is what places the physician's act into the category of letting die, rather than killing, and makes the same act by a nonphysician one of killing rather than letting die (a competent, authoritative refusal of treatment is typically absent when nonphysicians perform the same action). "Ceasing useless treatment" is neither conceptually nor morally the proper way to state the situation; "validly refused treatment" is the heart of the conceptual matter and the moral matter.

A similar claim about refusal of treatment has been defended by James L. Bernat, Bernard Gert, and R. Peter Mogielnicki.[49] They suggest that the type of action—killing or letting die—depends on whether a valid refusal warrants the forgoing of treatment, rather than the validity of the forgoing depending on whether it is an act of letting die. This suggestion is illuminating. Traditionally the distinction between killing and letting die was thought to be the first question to be decided, and it was thought that the distinction should be accounted for either in terms of *intention* (whether a person intends someone's death) or *causation* (whether a person causes someone's death).[50] The patient-refusal hypothesis provides a third way. It demotes causation and intention in importance and ascribes a pivotal role to *valid refusal.*

A refusal is valid if a patient or authorized decisionmaker autonomously refuses a proposed treatment. This account of a valid refusal is part of a larger account of the limits of the physician's authority, duties, and moral responsibilities. The physician has a duty to follow an appropriate refusal. This duty allows us to say that the physician's action of withholding or withdrawing does not cause death in the legal framework of proximate causation. The close connection between causation, duty, and causal responsibility is again apparent. Those who have looked to some of the nonlegal accounts of causation (outlined in Part IV) to determine whether physicians cause death have been looking in the wrong place if the point is to distinguish between killing and letting die; and physicians who have been worried about killing their patients have been thinking about causation in the wrong way. Although the physician's withdrawal of a treatment is a necessary part of a sufficient condition of the death as it occurs, the physician does not cause death in the relevant sense of "cause." The physician does not cause death because there is no duty to treat in the face of a valid refusal; and therefore the patient's preexisting condition becomes the proximate cause of death.

This theory gives meaning to the pivotal terms "killing" and "letting die" in

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49. BERNARD GERT, MORALITY: A NEW JUSTIFICATION OF THE MORAL RULES 294 (1988) [hereinafter GERT, MORALITY]; James L. Bernat, Bernard Gert & R. Peter Mogielnicki, *Patient Refusal of Hydration and Nutrition*, 153 ARCHIVES INTERNAL MED. 2723 (1993) [hereinafter Bernat et al.]; Bernard Gert et al., *Distinguishing between Patients' Refusals and Requests*, HASTINGS CENTER REP., July-Aug. 1994, at 13.

50. *See* Baruch Brody, *Withdrawal of Treatment versus Killing of Patients, in* INTENDING DEATH 90-103 (Tom L. Beauchamp ed., 1996).

a way that potentially protects the conventional moral thesis in law and medicine that it is justifiable to allow a patient to die and unjustifiable to kill a patient. Valid refusals warrant letting die, and forgoing treatment or active intervention to bring about death in the absence of a valid refusal exposes the physician to a charge of unjustified killing. Still to be considered is whether this thesis begs the central moral question by assuming, without argument, that only letting die is justified. An alternative, and my preference, is to frame acts of killing so that they can be justified on grounds that are strikingly similar to the justification of acts of letting die.

VI. Valid Requests as the Justificatory Basis of Killing

If the justification of the physician's actions is determined by a valid authorization, must the notion of a valid *authorization* be confined to a valid *refusal*? Can a valid *request* be as authoritative as a valid *refusal*?

The primary justification advanced in both law and morals for requirements that competent informed refusals be honored is the right of self-determination. The principle of self-determination in recent legal literature is the functional equivalent of the moral principle of respect for autonomy.[51] A major concern of the law is to prescribe the precise duties that devolve upon physicians in order that rights of autonomy be protected. In the last two decades it has become clear that a valid refusal of treatment obligates the physician to forgo treatment, even if it is a refusal of hydration and nutrition or a life-support system that will result in death.[52] Whenever valid refusals occur, it is never a moral offense to comply with the refusal, and how the death occurs from the refusal is irrelevant.[53]

By not categorizing the withholding or the withdrawing of a validly refused medical treatment as "killing," we have signaled our acceptance of the physician's nontreatment even when treatment is medically indicated. Had we judged withholding and withdrawing treatment morally unacceptable when competent persons refuse treatment, we would have categorized such conduct by physicians

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51. The classic origins of this principle for medical contexts is Schloendorff v. Society of New York Hospitals, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault."). Despite such strong rights language, all courts passing on the issue have ruled that a patient's right to self-determination, as protected by the legal doctrine of informed refusal and informed consent, is not absolute in the sense of always validly overriding every competing claim. Several legally justified exceptions are recognized. In general, legal duties and rights, like moral duties and rights, have no more than prima facie value. A prima facie legal duty such as the duty to obtain informed consent is therefore not always an *actual* duty. Valid exceptions are admitted in both law and ethics if promotion of the best interests of society or of the individual demands them, but many proposed exceptions and justifications are highly controversial.

52. MEISEL, *supra* note 2; Meisel, *supra* note 2; Weir & Gostin, *supra* note 2.

53. For a compelling case of death by seizure after refusal of seizure-preventing medication, see Stephanie Cate, *Death by Choice*, 91 AM. J. NURSING 32 (1991).

as killing (perhaps mercy killing, but still killing). Similarly, had we found moral grounds not to accept refusals by competent persons, we might have chosen not to categorize such conduct as forgoing life-sustaining treatment, and instead have categorized it as suicide.

Valid refusals now have extraordinary power in law and morals, but the same will be true of valid requests if we come to view competent requests as having the same authorizing power in medicine as competent refusals. Bernat, Gert, and Mogielnicki argue that a request for assistance in dying by a competent patient does not have the same authority and obligatory force in law and morals as a valid refusal and, therefore, does not, in the same way justify an action of physician-assisted suicide or voluntary active euthanasia. Conventional medical ethics, such as the doctrines still espoused by the American Medical Association, would take their conclusion and use it to support the additional conclusion that physicians are obligated not to honor patients' requests for either euthanasia or physician-assisted suicide. However, this conclusion does not appear to be the one that Bernat, Gert, and Mogielnicki embrace. They write cryptically as follows:

> Physicians should honor patients' requests or refuse to honor them based upon their own carefully considered professional judgment about the legal, moral, and medical appropriateness of doing so. A common example of the exercise of this freedom is physicians' refusal to prescribe requested narcotics in situations in which they judge narcotics to be inappropriate.[54]

These authors have argued convincingly that patients' requests do not obligate physicians in the way patients' refusals do. They thus leave the door open to the *justifiability* of honoring requests by patients for euthanasia or physician-assisted suicide, even though physicians are not *obligated* to honor the request. Surprisingly, they neither explain this position nor explore its implications.[55] This disregard of the problem is particularly striking in light of their overall argument, which appears to deny any real need for physician-assisted death and appears to support, rather than reject, the traditional medical ethics position of opposition to all forms of killing. Gert, Bernat, and Mogielnicki argue:

> [T]here are often strong moral and legal reasons against [honoring patient requests for death], *because* honoring such requests is killing or assisting suicide. Recognition of the distinction between refusals and requests is an important reason for preferring patient refusal of food and fluids to voluntary active euthanasia or physician-assisted suicide as a method for determining the timing of one's death.[56]

They also defend a legal statute with the following language: "The physician shall

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54. Gert et al., *supra* note 49.

55. The position was not even mentioned in Gert, Bernat, and Mogielnicki's first article. Bernat et al., *supra* note 49. The position appears in a single sentence in the second article, Gert et al., *supra* note 49, at 13.

56. Gert et al., *supra* note 49, at 14 (emphasis added).

not provide [pain] medication for the purpose of hastening the time of death."[57] Moreover, the authors state that they "agree with the conclusions" of the American Medical Association's report of the Council on Ethical and Judicial Affairs, which absolutely proscribes the honoring of requests for euthanasia or physician-assisted suicide.[58]

The above quotation from Gert, Bernat, and Mogielnicki contains the seeds of the correct moral position, but the position remains to be expounded and defended. The present author's view, which is clearly inconsistent with the AMA report, is summarized by the following:

> (1) Physicians are both morally and legally required to honor refusals that will lead to death;
> (2) Physicians are not legally required to honor requests other than those for abatement of treatment that will lead to death (only a "request" that is actually a refusal of treatment);
> (3) Whether physicians are either morally permitted or morally required[59] to honor requests for direct assistance that will lead to death depends on the nature of the request, the nature of the patient-physician relationship, and the nature of the physician's prior commitments.[60]

The first two have already been sufficiently explored, but the third needs explanation and defense.

Although the third thesis perpetuates use of the term "request," this language does not adequately capture the nuances of many circumstances in which patients and physicians make decisions about euthanasia and physician-assisted suicide.[61] In the clearest cases of justified compliance with requests, the patient and the physician discuss the patient's best interest. The major assumption is that the physician will not abandon the patient or resist what they jointly determine serves the patient's best interests, even if that determination is death. The justifiability of the physician's role in assisting with a patient's death in such circumstances is in part contingent on the nature of the physician's relationship with the patient and the values at work in their relationship.[62] A physician with a broad set of

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57. *Id.* at 15.

58. *Id.* at 13 (citing Council on Ethical and Judicial Affairs, American Medical Association, *Decision Near the End of Life*, 267 JAMA 2229 (1992)).

59. For a strong thesis stating that in certain cases ordinary medical practitioners are duty-bound to assist patients in bringing about death, see Malcolm Parker, *Moral Intuition, Good Deaths and Ordinary Medical Practitioners*, 16 JAMA 28 (1990).

60. *See* Timothy E. Quill, *Doctor, I Want to Die. Will You Help Me?*, 270 JAMA 870, 872 (1993).

61. *See, e.g.*, Bernard M. Dickens, *When Terminally Ill Patients Request Death: Assisted Suicide Before Canadian Courts*, 10 J. PALLIATIVE CARE 52 (1994); K. M. Foley, *The Relationship of Pain and Symptom Management to Patient Requests for Physician-assisted Suicide*, 6 J. PAIN & SYMPTOM MGMT. 289 (1991); Frederick M. Maynard, *Responding to Requests for Ventilator Removal from Patients with Quadriplegia*, 154 W. J. MED. 617 (1991).

62. *See* Nancy Jecker, *Giving Death a Hand: When the Dying and the Doctor Stand in a*

professional commitments to help patients die has made a moral commitment[63] that differs from the commitment made by a physician who draws the line in opposition to all forms of euthanasia and assistance in suicide.[64]

In some cases, patients in a close relationship with a physician *both* decline a possible treatment *and* request an accelerated death in order to lessen pain or suffering. In these cases, the refusal and the request are combined as parts of a single plan. If the physician agrees with the plan, assisted suicide or active euthanasia grows out of the close patient-physician relationship established by the two parties. In the context of such a relationship it would not be surprising if some physicians preferred active euthanasia to the form of physician-assisted suicide envisaged in Oregon, which allows prescribing drugs for suicide, but does not allow providing aid to patients at the point when they most need the care, comfort, and reassurance that a good physician can provide. How society is to judge the quality of such relationships (and whether it should judge them at all) is an unsettled matter, but it is beyond reasonable doubt that at least some patients and physicians have established this type of relationship.

When patients make reasonable requests for assistance in dying, physicians cannot escape responsibility for their decisions by refraining from helping their patients die. No physician can say, "I am not responsible for the result of my decision when I choose not to act on a patient's request." There has long been a vague sense in the medical and legal communities that if only the physician lets nature take its course, then the physician is not responsible for the resulting death. This account is misleading. A physician is always responsible for the decision taken and for the consequences of any action or inaction. The physician who complies with a patient's request is responsible in the same way a physician who refuses to comply with a request is responsible for his or her decisions.

Physicians who reject requests by patients cannot magically relocate responsibility by transferring it to the patient's disease. The only relevant matter is whether the physician has an adequate justification for the chosen course of action. Physicians have a responsibility to act in the best interests of their patients, and they cannot, without adequate justification, avoid what a patient believes to be in his or her best interests. It is undisputed, physicians often reject courses of action requested by patients and have good reasons for doing so. The question is whether the physician, who conscientiously believes that the patient's request for assistance in dying is justified and assumes responsibility for assistance, acts in a

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Special Relationship, 39 J. AM. GERIATRICS SOC'Y 831 (1991).

63. *See* Christine K. Cassel, *Physician-assisted Suicide: Are we Asking the Right Questions?*, SECOND OPINION, Oct. 1992, at 95; Sidney H. Wanzer et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 NEW ENG. J. MED. 844 (1989).

64. For such cautious approaches, see PHILIP E. DEVINE, THE ETHICS OF HOMICIDE (1978); CARLOS F. GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS (1991); Eric D. Caine & Yeates Conwell, *Self-determined Death, the Physician, and Medical Priorities: Is There Time to Talk?*, 270 JAMA 875 (1993); Yeates Conwell & Eric D. Caine, *Rational Suicide and the Right to Die*, 325 NEW ENG. J. MED. 1110 (1991); Edmund Pellegrino, *Compassion Needs Reason Too*, 270 JAMA 874 (1993).

morally justifiable manner in complying with the request even when it is not legally justifiable.

Bernat, Gert, and Mogielnicki might object that I am confusing moral duties to honor refusals with nonrequired moral ideals of honoring requests. They apparently regard physicians who honor the patient's assisted suicide requests as exceeding professional duties by acting on personal and optional moral ideals. This classification of the physician's commitments as a moral ideal is sensible, but the distinction can also be misleading without further qualification, for two reasons. First, professional obligations do not coincide with moral obligations applicable to all persons. Second, acting in accordance with one's sense of moral integrity is not easily distinguished from acting pursuant to obligations, especially in professional life.

The complex interplay of impartial obligations, professional duties, moral ideals, and virtues become difficult for a physician to untangle both in the abstract and the specific. The commitments of physician Timothy Quill, discussed in detail below, provide a case in point. He argues that there is an obligation for a physician to be compassionate, and he thinks the obligation knows no clear boundaries in the territory of patients' requests and physicians' responses. Indeed, he views a professional's obligation to be compassionate as the justification for honoring a patient's requests.[65] Another physician might reasonably argue that there is a moral obligation to help dying patients die in the most humane manner. Under this perspective, if assisting in suicide is the most humane manner, then it is obligatory not because of an ideal of assistance but because of a fundamental moral obligation of humane treatment.

Another relevant consideration, as Gert has argued,[66] is that moral ideals sometimes legitimately override moral duties when they conflict. Even if there is a moral duty to obey the law and the law prohibits physician-assisted suicide and voluntary active euthanasia,[67] the physicians who *justifiably* believe that their moral ideals override all other moral duties will not be morally wrong in acting on their beliefs. This conclusion may be consistent with the position of Gert, Bernat, and Mogielnicki, but it is inconsistent with the AMA report and with every statement on the subject issued by a major professional association.[68]

VII. The Wrongness in Causing or Assisting in Death

Could assistance in someone's self-requested death be wrong, even if both the physician and the patient conscientiously believe it to be right? The only way to decide in specific cases whether killing is wrong and letting die is not wrong is to

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65. Timothy E. Quill, *Incurable Suffering*, Hastings Center Rep., Mar.-Apr. 1994, at 45.

66. Gert, Morality, *supra* note 49, ch. 8.

67. *Contra* H. Tristram Engelhardt & Michelle Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 Sw. L.J. 1003 (1982).

68. *See infra* note 83 (listing American Medical Association, Council on Ethical and Judicial Affairs, American Geriatrics Society, Public Policy Committee, American Neurological Association, Committee on Ethical Affairs, and American Thoracic Society).

determine what *makes* death wrong. Under certain circumstances, a person is not guilty of a crime or a wrongful act merely because he or she killed someone. Legitimate defenses for killing include killing in self-defense and killing by misadventure (accidental and nonnegligent killing while engaged in a lawful act). From a moral point of view, causing a person's death is wrong *when it is wrong* not because the death is *intended* or because it is *caused,* but because an unjustified harm or loss to the person occurs.

Death is bad for a person not because death is bad in itself, but because of the deprivation of opportunities and goods that life would otherwise have afforded.[69] Therefore, what makes a physician's act of killing or assisting in death wrong, when it is wrong, is that a person is unjustifiably harmed. In other words, it is wrong if the person unjustifiably suffers a setback to interests that the person otherwise would not have experienced. In particular, the person is caused a loss of goods and the capacity to plan and choose a future. Failure to avoid causing these losses, when one could do so, is the sole source of the wrongfulness of the action.[70]

The critical question for acts of killing in medicine is whether an act of assisting persons in bringing about their deaths causes them a loss or, rather, provides a benefit. If a person chooses death and sees that event as a personal benefit, then helping that person bring about death neither harms nor wrongs the person and may provide a benefit or at least fulfill the person's last important goal. This typical aid might harm society by setting back its interests, which also might constitute a reason against *legalization.* However, this social harm does not alter conclusions about the justifiability of the *act* of helping in an individual case. Not helping persons to die can interrupt or frustrate their goals and, from their perspective, cause them harm, indignity, or despair—even if, at the same time, it protects society's interests.

VIII. THE RIGHTNESS IN CAUSING OR ASSISTING IN DEATH

These conclusions can now be linked to the earlier conclusions about valid refusals and valid requests. If passive allowance of death based on valid refusals does not harm or wrong persons or violate their rights, how can assisted suicide and voluntary active euthanasia harm or wrong the person who dies? In both voluntary active euthanasia and passive letting die, persons refuse to go on and seek the best means to the end of quitting life. Their judgment is that continuing life is, on balance, worse than not continuing it. The person who attempts suicide, the person who seeks active euthanasia, and the person who forgoes life-sustaining treatment to end life are identically situated except that they may select different means to end their lives.[71] Therefore, those who believe it is morally acceptable

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69. THOMAS NAGEL, *Death, in* MORTAL QUESTIONS (1979). For criticisms and extensions, see F. M. KAMM, MORALITY, MORTALITY ch. 1 (1993).

70. *Cf.* Allen Buchanan, *Intending Death: The Structure of the Problem and Proposed Solutions, in* INTENDING DEATH 34-38 (Tom L. Beauchamp ed., 1996).

71. For the extension to suicide, see Dan W. Brock, *Death and Dying, in* MEDICAL ETHICS

to let people die when they refuse treatment, but not acceptable to take active steps to help them die when they request assistance, must give a different account of the wrongfulness of killing and letting die than I have offered.

I reiterate that the justification of assistance in bringing about death that I have offered is an extension of the justification of letting patients die. It is not an appeal to conventional ways in which acts of killing have been justified, such as the familiar justifications for killing in war, killing in self-defense, capital punishment, and the like. The irrelevance of this kind of appeal to the medical context is one reason why assistance by physicians in bringing about death has been so long resisted. My argument is simply that letting a patient die by accepting a valid refusal to continue in life is directly analogous to helping a patient die by accepting a valid request rather than forcing the patient to continue in life.

In this argument the high value we place on rights of autonomy spills over from the well recognized right to refuse, into the underexplored right to request. Killing an autonomous person against the person's desires is a clear and fundamental violation of autonomy, but killing an autonomous person in accordance with the person's desires and instructions shows a basic respect for the person's rights and autonomy. As the autonomy interest in this choice increases on the scale of interests, denial of help to the patient becomes more burdensome; and to increase the burden is to increase the harm done to the person. There is no reason why it would be wrong for a patient to make such a request, and no reason why it would be wrong for a physician to agree to the patient-recommended sequence of events. Moreover, a rejection of the patient-recommended plan is, at least from the patient's perspective, an act against the patient's best interests.

Medicine and law now seem to say to many patients, "If you were on life-sustaining treatment, you could withdraw the treatment and we could let you die. Because you are not, we can only give you palliative care until you die a natural death." This position condemns the patient to live out a life he or she does not want—a form of cruelty that violates the patient's rights and prevents discretionary discharge of the fiduciary duties of the physician. This is not to claim that physicians face large numbers of desperately ill patients. Pain management has made circumstances at least bearable for many of today's patients,[72] reducing the need for physician-assisted suicide and euthanasia and increasing the need for adequate facilities, training, and hospice programs.[73] Nonetheless, the available medical literature indicates that some patients cannot be satisfactorily relieved,[74]

329, 345 (Robert M. Veatch ed., 1989); Kadish, *supra* note 17, at 866-67.

72. Foley, *supra* note 61, at 289-97; D. E. Weissman, *Physician Assisted Suicide*, BIOETHICS BULL., 1991, at 3-4.

73. Greg A. Sachs et al., *Good Care of Dying Patients: The Alternative to Physician-Assisted Suicide and Euthanasia*, 43 J. AM. GERIATRICS SOC'Y 554 (1995); Joan Teno & Joanne Lynn, *Voluntary Active Euthanasia: The Individual Case and Public Policy*, 39 J. AM. GERIATRICS SOC'Y 827 (1991). For a different slant on these issues, see Cranford, *supra* note 48, at 150-61.

74. *See* Gregg A. Kasting, *The Nonnecessity of Euthanasia*, *in* PHYSICIAN-ASSISTED DEATH 25-45 (James M. Humber et al. eds., 1994); Timothy E. Quill et al., *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-assisted Suicide*, 327 NEW ENG. J. MED. 1380 (1992).

and, even if they could, questions would remain about the autonomy rights of patients to pursue their own plans in life[75] and about the fact that many patients are more concerned about suffering and indignity than about pain.[76]

Current social institutions, including the medical system, have not proved adequate for patients like those who turn, in desperation, to Jack Kevorkian. His methods are far from emulable, but those who rely on him raise profound questions about the lack of a support system in medicine or elsewhere for handling their problems. Dying persons often face inadequate counseling, emotional support or information for pain control. Their condition is intolerable from their perspective, and they see their situation as without hope. To maintain that these persons act immorally by arranging for death is a harsh and unwarranted judgment.

Even if their decisions and acts are easily explained and thoroughly justified, doubt still exists as to whether it is justifiable for physicians to assist in suicide. Should we judge the physician's decision differently than the patient's? The most widely discussed case about physician-assisted suicide in recent years has been physician Timothy Quill's report of his relationship with a 45-year-old leukemia patient.[77] The patient did not let the matter rest with a refusal of chemotherapy, which offered a twenty-five percent chance of a long-term cure, and Quill prescribed the barbiturates she desired. Many believe that Quill's actions were justified because the patient was competent and informed, had an incurable condition associated with severe suffering, had a longstanding and meaningful relationship with the physician characterized by informed decisionmaking, and had a durable desire for death and repeatedly requested to die.[78] Quill has defended his views with the argument that such acts are justified not as much by the *rights of patients*, but by the physician's *compassionate response* to an exceptional circumstance of suffering in which no good alternatives remain for the patient.[79]

Nonetheless, critics have found the action by Quill morally and legally unwarranted and a breach of physician ethics.[80] Quill has acknowledged that he violated a New York State law against assisted suicide that exposed him to criminal liability and opened up the possibility of misconduct charges from the New York State Health Department. In order to protect himself and the patient's family, and to avoid a police investigation and an ambulance at the scene, he lied

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75. Helga Kuhse, *Active and Passive Euthanasia—Ten Years into the Debate*, *in* THE EUTHANASIA REVIEW 108, 117 (1986); Parker, *supra* note 59, at 28-34.

76. Weir, *supra* note 10, at 123.

77. Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691 (1991), *reprinted in* TIMOTHY QUILL, DEATH AND DIGNITY (1993). *See also* Quill v. Koppel, 870 F. Supp. 78 (S.D.N.Y. 1994).

78. Quill et al., *supra* note 74, at 1382.

79. Quill, *supra* note 77, at 693-94. *See also* Christine K. Cassel & Diane E. Meier, *Morals and Moralism in the Debate over Euthanasia and Assisted Suicide*, 323 NEW ENG. J. MED. 750 (1990).

80. *See* Conwell & Caine, *supra* note 64; Pellegrino, *supra* note 64, at 874-75; Peter A. Ubel, *Assisted Suicide and the Case of Dr. Quill and Diane*, 8 ISSUES IN L. & MED. 487 (1993).

to the medical examiner by reporting that a hospice patient had died of acute leukemia. Subsequently, a grand jury in Rochester, New York, where the events occurred, declined to indict Quill.[81] From the jury's perspective, Quill did nothing wrong. That is, even though he violated the law, on balance, he did nothing *morally* wrong and the moral justification overrides the legal violation.

Whether grand juries should reach such decisions is, of course, another matter, but it is not surprising that jurors accepted Quill's view that physician-assisted suicide can be a form of humane responsiveness to patients' requests and can protect vulnerable persons who have a strong relationship with a physician. Quill has insisted that physician-assisted suicide should never be substituted for comprehensive care or for helping patients resolve physical, personal, and social challenges posed by the dying process. He also believes that physicians are *obligated* to explore an incurably ill patient's informed request for help in dying and under appropriate circumstances the physicians must comply with it.[82]

If this claim and the earlier argument in this Part are sound, then the burden of justification for proscriptions of acts of voluntary active euthanasia and physician-assisted suicide rests on those who refuse or hinder assistance to competent patients who elect death, rather than on those who assist them. Associations of medical professionals in the United States seem to have improperly reversed this order of justification by placing the burden on physicians who want to assist patients.[83] Of course, the merit of this conclusion depends on how one interprets the vague and imprecise guidelines generated by these professional associations. Their guidelines might be interpreted as:

(1) policies for members of a particular professional medical association;
(2) policies for members of the medical profession generally; or
(3) public policy governing members of a profession.

Professional associations have not clarified which group their guidelines are

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81. Lawrence K. Altman, *Jury Declines to Indict a Doctor Who Said He Aided in a Suicide*, N.Y. TIMES, July 22, 1991, at A1.

82. Quill et al., *supra* note 74, at 1380-84. These authors defend physician-assisted suicide, but not voluntary active euthanasia. *See also* Quill, *supra* note 60, at 870-73; Timothy E. Quill, *The Ambiguity of Clinical Intentions*, 329 NEW ENG. J. MED. 1039 (1993).

83. Council on Ethical and Judicial Affairs, American Medical Association, *Euthanasia: Report C*, *in* PROCEEDINGS OF THE HOUSE OF DELEGATES 258-60 (Chicago: American Medical Association June 1988); *see also Decisions Near the End of Life*, *supra* note 14; American Geriatrics Society, Public Policy Committee, *Voluntary Active Euthanasia*, 39 J. AM. GERIATRICS SOC'Y 826 (Aug. 1991); AMERICAN MEDICAL ASSOCIATION, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, TREATMENT DECISIONS FOR SERIOUSLY ILL NEWBORNS, REPORTS OF THE COUNCIL, No. 43, at 66-75 (Chicago: American Medical Association June 1992); American Neurological Association, Committee on Ethical Affairs, *Persistent Vegetative State: Report of the American Neurological Association Committee on Ethical Affairs*, *in* ANNALS OF NEUROLOGY 386-90 (1993); American Thoracic Society, *Withholding and Withdrawing Life-sustaining Therapy*, 115 ANNALS OF INTERNAL MED. 478-85 (1991).

intended to cover. The problem is that their policies may legitimately apply to only the first, but the associations may believe that their policies apply to all three.

IX. The Distinction Between Justifying Policies and Justifying Acts

The argument thus far suggests that physicians' acts of honoring valid refusals and acts of complying with valid requests can both be justified. Is this argument sufficient to show that *public policies*, such as Measure 16 in Oregon, are justified? It is possible, without inconsistency, to hold strong views about the justifiability of some acts of physician-assisted suicide and support public policies that prohibit these acts. One can consistently judge acts morally acceptable that one cannot support legalizing.

The resistance to physician-assisted suicide and voluntary active euthanasia has long been the wedge or slippery slope argument.[84] This argument is grounded in a cautious conception of human nature and society. The reasoning is that practices that are acceptable in one type of circumstance will, inevitably be extended to similar circumstances in which the practices are morally unacceptable. For example, even if particular acts of assistance in dying are morally justified in circumstances of a substantial patient-physician relationship, the social consequences of sanctioning practices of killing in these circumstances would inevitably be extended to cases in which serious risks of abuse in patient-physician relationships would outweigh the benefits to society.

This argument is commonly applied to public policy and to the patient-physician relationship, which is driven by cure, amelioration, and prevention of illness, pain, and disability.[85] To introduce killing into this relationship, it is argued, threatens to distort it and will eventually impair the trust and respect vital to the relationship.[86] A removal of current prohibitions could weaken the fabric of restraints and beneficial attitudes,[87] raising doubts in the patient's mind about the physician's commitment to the patient and to the provision of effective treatment.[88] The argument is not that these negative consequences will occur

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84. *Cf.* James Rachels, The End of Life: Euthanasia and Morality ch. 10 (1986); Douglas Walton, Slippery Slope Arguments (1992); Mary Warnock, The Uses of Philosophy (1992); Wibren van der Burg, *The Slippery Slope Argument*, 102 Ethics 42 (1991); Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985).

85. *See* Alan J. Weisbard & Mark Siegler, *On Killing Patients with Kindness: An Appeal for Caution*, *in* J. Arras & N. Rhoden, Ethical Issues in Modern Medicine 218 (1989); H. J. J. Leenen & Chris Ciesielski-Carlucci, *Force majeure (Legal Necessity): Justification for Active Termination of Life in the Case of Severely Handicapped Newborns after Forgoing Treatment*, 2 Cambridge Q. Healthcare Ethics 271 (1993); Alan D. Ogilvie & S. G. Potts, *Assisted Suicide for Depression: The Slippery Slope in Action?: Learning from the Dutch Experience*, 309 Brit. Med. J. 402 (1994).

86. Cassel & Meier, *supra* note 79, at 750-752; Watts & Howell, *supra* note 15, at 1043-46.

87. Raymond J. Devettere, *Slippery Slopes and Moral Reasoning*, 3 JAMA 298 (1992).

88. David Orentlicher, *Physician Participation in Assisted Suicide*, 262 JAMA 1844 (1989); *see also* David Orentlicher et al., *Physician Participation in Assisted Suicide [Letters and*

immediately after legalization of physician-assisted suicide, but that they will grow incrementally over time.[89] Society might start with innocent beginnings by developing policies that carefully restrict the number of patients who qualify for assistance in suicide, but these policies will be weakened as the practice continues.[90] The next generation, having grown up with the expectation that terminally ill patients who drain medical resources opt for death, will have lost the old values that buffered patients from manipulation by this expectation.[91]

A major concern is that if active euthanasia or physician-assisted suicide were legalized, it would quickly move beyond competent patients and voluntary choice.[92] As active euthanasia grew in acceptance, the same advantages would be extended to incompetent patients who are seriously suffering but have not expressed a preference for assistance in dying.[93] Some believe that the United States Supreme Court created such small beginnings in the case of Nancy Cruzan, and that the citizens of Oregon enlarged the problem by voting to legalize physician assistance in dying.[94] The concern is that restrictions initially built into legislation will be revised over time and increase the possibilities for unjustified killing. Unscrupulous persons will learn how to abuse the system, just as they do with methods of tax evasion that operate on the margins of legitimate tax avoidance. These concerns will be escalated in importance if the medical system does not come to grips with the needs of terminally ill and vulnerable patients.[95]

Response], 263 JAMA 1197 (1990).

89. Some believe they have already so changed. *See* Charles L. Sprung, *Changing Attitudes and Practices in Forgoing Life-sustaining Treatments*, 263 JAMA 2211(1990); *see also* Peter A. Singer & Mark Siegler, *Euthanasia—A Critique*, 322 NEW ENG. J. MED. 975 (1990); Doerflinger, *supra* note 34, Special Supplement 16-19; Wanzer et al., *supra* note 63, at 844-49.

90. C. Everett Koop & Edward R. Grant, *The 'Small Beginnings' of Euthanasia: Examining the Erosion in Legal Prohibitions against Mercy-killing*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 585 (1986); Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 102 (1985).

91. K. Danner Clouser, *The Challenge for Future Debate on Euthanasia*, 6 J. PAIN & SYMPTOM MGMT. 310 (1991).

92. Victor G. Rosenblum & Clarke D. Forsythe, *The Right to Assisted Suicide: Protection of Autonomy or an Open Door to Social Killing?*, 6 ISSUES IN L. & MED. 3 (1990).

93. Yale Kamisar, *Preserve Traditional Restraints*, A.B.A. J., Apr. 1993, at 43; Marjanke Spanjer, *Terminating Life of Severely Handicapped Dutch Baby*, 345 LANCET 975 (1995); Richard Tomlinson, *China Considers Voluntary Euthanasia*, 310 BRIT. MED. J. 761 (1995).

94. Edward R. Grant & Cathleen A. Cleaver, *A Line Less Reasonable:* Cruzan *and the Looming Debate over Active Euthanasia*, 2 MD. J. CONTEMP. LEGAL ISSUES 99 (1991); Mark E. Haddad, Cruzan *and the Demands of Due Process*, 8 ISSUES IN L. & MED. 205 (1992); Patricia A. King, *The Authority of Families to Make Medical Decisions for Incompetent Patients after the* Cruzan *Decision*, 19 LAW MED. & HEALTH CARE 76 (1991); John N. Suhr, Cruzan v. Director, Missouri Department of Health*: A Clear and Convincing Call for Comprehensive Legislation to Protect Incompetent Patients' Rights*, 440 AM. U. L. REV. 1477 (1991).

95. George J. Annas, *Physician-Assisted Suicide—Michigan's Temporary Solution*, 328 NEW ENG. J. MED. 1573 (1993); Singer & Siegler, *supra* note 89, at 1881-83; Teno & Lynn, *supra*

Such patients could easily be lost in the system, suffer a loss of rights in the system, or be encouraged to end their lives by the system's expectations.[96] They may not desire death, but they might feel that ending their lives is a social priority or duty.[97]

Some of these arguments may rest on premises of risk of abuse rather than the slippery slope premises, but it is difficult to separate the two cleanly, and all such arguments depend on speculative predictions of a progressive erosion of moral restraints and abuses that cannot be prevented by careful public policies. If the dire consequences they predict actually will develop from the legalization of assisted suicide or voluntary active euthanasia, then these arguments rightly suggest that practices should be legally prohibited. Still, we need to ask how good the evidence is that dire consequences will occur. Is there a sufficient reason to think that we cannot maintain control over and even improve public policy?[98] Those who use predictive arguments in defense of legalization and those who use such arguments in opposition to legalization owe us a careful accounting of the basis of their predictions. Empirical predictions require empirical support, and thus far the evidence is spotty on all sides and generally analyzed in favor of a predetermined favorite outcome.[99]

These difficult empirical questions are fundamental in the current social controversy about euthanasia. The substance of the empirical problems cannot be addressed here, but it follows from the earlier argument that even if slippery slope arguments provide solid reasons against legalization, they provide no basis for the conclusion that acts of euthanasia and physician-assisted suicide are morally wrong. Slippery slope arguments conclude that patients such as Sue Rodriguez and the patrons of Jack Kevorkian cannot be helped by physicians because giving help to those individuals would open the gates to killing persons who should not be killed. All patients should be denied help, not because of anything they have done or because of any demerit in their cases, but because acts of assistance in dying would hurt others if legalized and therefore should not be tolerated under any circumstances.

There is something very right and something very wrong about this argument—right because the argument points to dangers of the most profound sort, wrong because at least some patients deserve to be helped and their physicians do nothing morally wrong by helping them. It may therefore be necessary to prohibit these acts of assistance in our public policies while acknowledging that there is nothing morally wrong with the acts other than their

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note 73, at 828-29.

96. Joanne Lynn, *The Health Care Professional's Role When Active Euthanasia Is Sought*, 4 J. PALLIATIVE CARE 100 (1988); Susan Wolf, *Holding the Line on Euthanasia*, HASTINGS CENTER REP., Jan.-Feb. 1989, Special Report 13-15; Susan Wolf, *Gender, Feminism, and Death*, *in* FEMINISM & BIOETHICS (Susan Wolf ed., 1996).

97. *See* BATTIN, *supra* note 20, chs. 3, 8.

98. *Cf.* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994).

99. *Cf.* Meier, *supra* note 4.

potentially far-reaching social consequences. This position leaves room for justified civil disobedience, moral nonconformity, or evasive noncompliance with prohibitions recommended by professional associations.[100] I see no grounds for the judgment that carefully considered acts of noncompliance and moral nonconformity in helping desperately ill patients are morally indefensible.[101]

Should we rest satisfied with a situation in which disobedience is the physician's only choice? Despite the clear importance of concerns about slippery slopes, I believe the legislation in Oregon is a promising development, although not in the form passed. Although the AMA has declared that acts of assistance in suicide by physicians are "immoral," including the acts allowed under the Oregon bill, there is reason to believe that we should welcome some version of the Oregon legislation.[102] This suggestion may seem to contradict my earlier arguments about legalization, but slippery slope arguments should not be so paralyzing that we are not open to social innovation that will help us determine whether the empirical predictions they make are correct and whether one system works better than another.[103] The Oregon legislation could be viewed as a social trial that will eventually provide a valuable perspective on both the risks and the benefits. If careful research could help us evaluate such experimental programs in upcoming years, we could learn about benefits and risks in a comprehensive, timely, and objective manner.[104] Perhaps then we can be positioned to decide on the basis of evidence whether the slippery slope argument is as slippery as some fear it could be.

CONCLUSION

Avoidance of intentionally causing the death of patients is a deep and primitive restraint encouraged by the many reservations that we have long had about killing innocent persons. Even killing non-innocents, such as combatants in war and criminals, is troublesome to many persons. Our reservations are so deep in the case of innocent parties that in the criminal law the consent and encouragement of the person killed is no defense to the most serious of charges.

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100. *Cf.* James F. Childress, *Civil Disobedience, Conscientious Objection, and Evasive Noncompliance: A Framework for the Analysis and Assessment of Illegal Actions in Health Care*, 10 J. MED. & PHIL. 63 (1985).

101. For a contrasting view that rests on a form of slippery slope argument, see CALLAHAN, *supra* note 33, ch. 3.

102. Franklin G. Miller & John C. Fletcher, *The Case for Legalized Euthanasia*, 36 PERSPECTIVES IN BIOLOGY & MED. 159 (1993); Miller et al., *supra* note 15, at 119-23.

103. *See* Maria T. CeloCruz, *Aid-in-dying: Should We Decriminalize Physician-assisted Suicide and Physician-committed Euthanasia?*, 18 AM. J. L. & MED. 369 (1992); H. Hendin & Gerald Klerman, *Physician-assisted Suicide: The Dangers of Legalization*, 150 AM. J. PSYCHIATRY 143 (1993); Henk Jochemsen, *Euthanasia in Holland: An Ethical Critique of the New Law*, 20 J. MED. ETHICS 212 (1994); Wendy N. Weigand, *Has the Time Come for Doctor Death: Should Physician-assisted Suicide be Legalized?*, 7 J. L. & HEALTH 321 (1993).

104. Miller et al., *supra* note 15, at 122.

Proscriptions of physician assistance in bringing about death have been forged in this context of assumptions about the morality of killing. To change this perspective seems not merely to change what physicians do, but to threaten our whole structure of thinking about the place of the healing professions and about prohibitions in the criminal law. To decriminalize suicide was one thing; to decriminalize killing in medicine seems quite another.[105]

This line of reasoning, appealing as it is, provides us with a good reason for abandoning the killing-letting die distinction altogether. Instead of qualifying our views against killing in order to allow physicians to kill, we will be better off if we forswear the premises that physicians kill in these circumstances and that they violate a patient's right to life. A better perspective is that physicians can benefit patients in ways other than by healing and palliation, and that patients can waive their rights to ordinary protections. Similar reasons suggest abandoning the label "suicide" in "physician-assisted suicide."[106] The idea that terminally ill patients who seek to advance the date of their death commit suicide may be correct, but the morality of the circumstance seems more obscured than clarified by use of the term "suicide." The pejorative connotations of the term may serve to limit options and pressure patients unnecessarily.

Opponents of physician-assisted suicide and voluntary active euthanasia often allege that such acts by physicians will, over time, undermine the public's trust in physicians, changing the image from healer to killer. There may be some wisdom in this prediction, but the converse may be just as likely. The seriously ill and suffering will feel abandoned by both law and medicine and will come to distrust the members of these professions, especially when physicians insist on sustaining life whatever the cost to the patient's feelings, hopes, and plans.[107] Many persons deeply fear a time of indignity and increased suffering, and feel unempowered by the system to control their own fate. I believe that we have generally underassessed the importance of patient control at the end of life while overassessing the importance of physician control.

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105. A majority of states in the United States still have statutes criminalizing physician-assisted suicide; in other states homicide statutes could be invoked for the same actions. *See* Marzen et al., *supra* note 90.

106. *See* Robert A. Sedler, *Constitutional Challenges to Bans on 'Assisted Suicide': The View from Without and Within*, 21 HASTINGS CONST. L.Q. 786 (1994).

107. Richard W. Momeyer, *Does Physician-Assisted Suicide Violate the Integrity of Medicine?*, 20 J. MED. & PHIL. 17 (1995).

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ESSAY

THE GOLDEN ANNIVERSARY OF THE CHOICE OF LAW REVOLUTION: INDIANA FIRED THE FIRST SHOT

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Unheralded, unsung, and generally unrecognized, the 1945 decision of the Indiana Supreme Court in *W. H. Barber Co. v. Hughes*[1] helped change the course of choice of law in this country. *Barber* was the first case nationwide to abandon expressly the rigid rules of the *First Restatement of Conflict of Laws*[2] in favor of a more flexible multifactor approach that applies the law of that state "with which the facts are in most intimate contact."[3] Although *Barber's* rejection of the lex locus approach[4] of traditional conflict of laws scholars[5] occurred in the context of a contract dispute, over forty years would pass before the Indiana Supreme Court rejected the traditional conflicts doctrine in tort cases,[6] replacing it with a more refined analysis.[7] This Essay will celebrate the fiftieth anniversary of the choice of law revolution by focusing on *Barber* and the evolution of choice of law in Indiana. While other states have flailed about, flitting from one approach or set

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1. 63 N.E.2d 417 (Ind. 1945).

2. RESTATEMENT OF CONFLICT OF LAWS (1934).

3. *Barber*, 63 N.E.2d at 423.

4. Generally, the *First Restatement* provides that the place of contracting (lex locus contractus) determines the validity of a contract, while the place of performance determines all issues involving the manner and sufficiency of performance or excuse for nonperformance. RESTATEMENT OF CONFLICT OF LAWS §§ 332, 358 (1934). *See also* Joseph Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260 (1910).

5. *See, e.g.*, 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1916). Beale's theories were accepted and virtually unchallenged in the courts until mid-century. However, several scholars of the legal realism stripe criticized Beale's "vested rights" approach. *See, e.g.*, WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, chs. 1-3 (1942); ERNEST LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS, chs. 1-8 (1947); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178, 192 (1933).

6. RESTATEMENT OF CONFLICT OF LAWS § 384 (1934) (providing that the existence of a tort cause of action was governed, invariably, by the law of the place of wrong (lex loci delicti)).

7. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987).

of rules to another,[8] Indiana attempted to make steady and more consistent, albeit slow, progress toward a predictable, uniform, and perhaps, sufficiently flexible approach to clearing up the "dismal swamp"[9] of conflict of laws. For this Indiana ought to be congratulated, though much work remains to be done if these goals are to be achieved.

I. *BARBER*: THE FIFTEEN MINUTES OF FAME THAT NEVER WAS

W. H. Barber Co. v. Hughes presented a rather complicated fact pattern involving the validity of a promissory note and its cognovit[10] clause. The plaintiff was a Delaware corporation licensed to do business in Illinois with its principal place of business in Chicago. The defendants were Indiana domiciliaries. The promissory note was prepared and negotiated in Illinois and mailed there by defendants in Indiana. Upon defendants' falling behind in payments, the plaintiff obtained an Illinois judgment which it sought to enforce in Indiana.[11] Indiana, unlike Illinois, forbade the use of cognovit clauses. Chief Justice Richman

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8. New York is one example. New York is said to have "hopped frenetically from one theory to another like an overheated Mexican jumping bean." ROGER CRAMTON ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 243 (3d ed. 1981). *Compare* Cooney v. Osgood Mach., Inc., 612 N.E.2d 277 (N.Y. 1993) (analyzing a tort conflict of laws question about contribution by employing interest analysis and, secondarily, the so-called "Neumeier" Rules) *with* Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972) (three rules which essentially employ a territorialist view, focusing on the domicile, conduct, and, by default, the place of the accident) *and* Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963) (adopting a "grouping of contacts" test). *Babcock* engendered considerable confusion. *See, e.g.*, Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969); Dym v. Gordon, 209 N.E.2d 792 (N.Y. 1965). For a comprehensive treatment of the New York Court of Appeals' conflicts opinions, see Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983). Professor Kay engages in a similar analysis of choice of law decisions in California since 1970. *See* Herma H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 576 (1980). *See also* Herma H. Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747 (1984) (deploring the "decline in the clarity and precision of [California's] choice of law opinions" since 1970). Professor Juenger calls California's conflict of laws "bouillabaisse." Friedrich K. Juenger, Babcock v. Jackson *Revisited: Judge Fuld's Contribution to American Conflicts Law*, 56 ALB. L. REV. 727, 744 (1993).

9. "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). Forty-three years later, Prosser's comments are equally, if not more, salient. *See infra* notes 59-69, 77-84 and accompanying text.

10. This is a confession of judgment that permits a creditor to obtain a judgment in a sister state court without serving process on the debtor in the debtor's domicile state. *See* W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 417 (Ind. 1945).

11. Plaintiff relied on the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1.

concluded that the judgment was entitled to enforcement.

While initially paying lip service to traditional choice of law doctrine, citing[12] *Milliken v. Pratt*,[13] the paradigmatic lex locus contractus case, and vested rights/lex locus literature by Goodrich[14] and Beale,[15] Chief Justice Richman tested his conclusion that Illinois law governed the validity of the note and cognovit clause by reliance on two contemporary casebooks that described judicial efforts to find "'the most intimate contact'" or "'center of gravity'" with respect to contractual transactions.[16] Examining the "contact points," Richman noted that Illinois was the place where the parties' business was transacted almost exclusively, settlement conferences took place, and where the note was prepared and payable. Further, the note was on an Illinois form and Illinois law was intended to be applied. The only "contact points" with Indiana were the debtors' residence and where they signed the note and placed it in the mail.[17] Thus, Richman concluded that the disputed transaction "centered" in Illinois and that its law applied.[18] This result, achieved by a method, "[s]o far [unknown to have] been formulated by any court into a rule,"[19] began the choice of law revolution.

If, indeed, Indiana led the nation by deploring "the unsatisfactory state of the decisions" and by "resort[ing] to a method used by modern teachers of Conflict of Laws,"[20] why is it that so little celebration or recognition in the academy occurred then or in the ensuing years?[21] Only a few writers have even mentioned, and then mostly in passing, *Barber*'s special place in conflict of laws history.[22] In contrast,

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12. *Barber*, 63 N.E.2d at 421.

13. 125 Mass. 374 (1878).

14. HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS § 104, at 262 (2d ed. 1938).

15. JOSEPH BEALE, CONFLICT OF LAWS § 1048 (1916).

16. *Barber*, 63 N.E.2d at 423 (citing CHEATHAM ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS (2d ed. 1941); HARPER & TAINTOR, CASES AND OTHER MATERIALS ON JUDICIAL TECHNIQUES IN CONFLICT OF LAWS (1937)).

17. *Id.* at 423.

18. *Id.* at 423-24. The court further rejected defendants' attempt to apply extraterritorially Indiana's law forbidding cognovit clauses, as well as an argument based on public policy. *Id.* The full faith and credit mandate, explicated in Fauntleroy v. Lum, 210 U.S. 230 (1908), foreclosed the policy argument. *Barber*, 63 N.E.2d at 423-24.

19. *Barber*, 63 N.E.2d at 423.

20. *Id.*

21. The publication deadline of this journal forecloses our ability to wait for a new Oliver Stone movie describing the *Barber* conspiracy. Hollywood insiders report that the movie reveals a Cuban connection to A.L.I. folks and that "Checkers" is implicated in *Barber*-gate. In a tour de force, Brad Pitt will enact the role of the cognovit clause.

22. *See, e.g.*, ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW: CASES AND MATERIALS 403 (2d ed. 1989) (reproducing the *Auten v. Auten* decision, 124 N.E.2d 99 (N.Y. 1954), which credited *Barber* as the "first" to employ the new method to rationalize choice of law results); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 18.28, at 677 n.3 (relegating *Barber* to a footnote as an "early decision" reflecting RESTATEMENT (SECOND) CONFLICT OF LAWS

Babcock v. Jackson,[23] decided eighteen years after *Barber*, is described thusly: "[I]ts report was like a cannon shot. Most of its precursors among other cases came off, in retrospect, like caps in a toy pistol. *Babcock* was the big bang . . . ."[24] A contemporary symposium, with contributions by conflicts' big guns such as David F. Cavers, Elliot E. Cheatham, Brainerd Currie, Albert A. Ehrenzweig, Robert A. Leflar, and Willis L.M. Reese, greeted *Babcock*'s arrival on the scene.[25] Most conflict of laws casebooks reproduce the case as an introduction to modern conflicts doctrine.[26] And, in 1993, *Babcock* was treated to its second symposium with another line-up of conflicts gurus.[27] Why so much fuss about *Babcock* and so little about *Barber*? Is New York provincialism, so well-satirized in Saul Steinberg's famous *New Yorker* magazine cartoon, responsible for *Babcock's* ascendancy and *Barber's* relative obscurity? Is the Second City Syndrome (writ large) at work here?

One possible explanation is that *Babcock* is a tort case involving that erstwhile darling of conflict of laws scholars—a guest statute[28]—while *Barber* is a contract

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§ 195 (1971), while noting *Auten* as an early departure from the rigid *First Restatement* rules. *Id.* § 18.17, at 657); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.3 D, at 377 n.43 (3d ed. 1986) (citing *Barber* as one of a number of courts which hold that questions of contract validity are to be controlled by the state with the most significant relationship); Herma Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747, 755 n.60 (1984) (recognizing *Barber* as prior to Traynor's "pathbreaking" opinions); Herma Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 526 (1983) (*Barber* as precursor to the New York approach in *Auten*); James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 75 & n.3 (1991) (recognizing that *Barber* may have been the first court to use "center of gravity"); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1073 (1987) (recognizing the "now classic" *Barber* as the first "to depart conclusively from traditional choice of law rules").

23. 191 N.E.2d 279 (N.Y. 1963).

24. David D. Siegel, *A Retrospective on* Babcock v. Jackson*: A Personal View*, 56 ALB. L. REV. 693, 694 (1993).

25. Symposium, *Comments on* Babcock v. Jackson*, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

26. *See* Michael Solimine, *The Impact of* Babcock v. Jackson*: An Empirical Note*, 56 ALB. L. REV. 773 n.6 (1993). In their most recent edition, however, the editors of the casebook I have adopted for use in my Conflict of Laws class have reduced *Babcock* to editorial commentary. *See* ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 165 (5th ed. 1993). I deny categorically that this is why I use this text.

27. *See Symposium on Conflict of Laws: Celebrating the 30th Anniversary of* Babcock v. Jackson, 56 ALB. L. REV. 693-939 (1993).

28. Friedrich K. Juenger has often criticized conflicts scholars for their inordinate attention to guest statute cases. *See, e.g.*, FRANK K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 235 (1993). On the other hand, Juenger himself, heaping encomia of praise onto *Babcock*, says that while "it does not rise to the level of *Marbury v. Madison* or *Brown v. Board of Education*, and lacks the topicality of *Roe v. Wade*, [*Babcock*] may well rank with such classics as *Erie Railroad v. Tompkins* and *International Shoe Co. v. Washington* in seminal importance, if not in frequency

case about promissory notes and cognovit provisions, hardly the stuff that might make our hearts beat faster. Also, everyone knows that torts are sexier than contracts.[29] No one yet has made a movie of *Hadley v. Baxendale*,[30] but *Palsgraf*,[31] the cult movie,[32] has excited generations of law students. (Passengers raising their noses to the sky to sniff for "negligence in the air" is one of the great American film moments!) That *Babcock* is a tort case, however, does not explain fully its fame compared to *Barber*. For almost a decade prior to *Babcock* the New York Court of Appeals adopted a "center of gravity" approach in a contract/matrimonial case.[33] Decided nine years after *Barber*, *Auten* was also widely recognized in casebooks and commentaries.[34]

Michael Solimine posits several reasons for *Babcock*'s influential status: the high prestige of the New York Court of Appeals, the court's adoption of proposals made by certain scholars who, in turn, warmly applauded the decision, the tendency of the court toward judicial innovation in several areas of the law, and the explicit use of new choice of law doctrine to trash outmoded or disfavored tort laws.[35] As to this last factor, *Babcock* refused to apply Ontario's harsh guest statute because Ontario (the place of injury) had no interest implicated in a case where the plaintiff, defendant, and insurance company were not Ontario residents.[36]

The California Supreme Court, per Chief Justice Traynor,[37] and the Wisconsin Supreme Court[38] had also used innovative choice of law methods as a "way out" of anachronistic tort results or to avoid disfavored substantive tort law. In the future, it may very well be that we will see more creative choice of law decisions by way of innovation or manipulation of existing doctrine given the disparity between states' tort laws in the wake of the current round of tort reforms.[39] Of

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of citation." *See* Friedrich K. Juenger, Babcock v. Johnson *Revisited, Judge Fuld's Contribution to American Conflicts Law*, 56 ALB. L. REV. 727 (1993).

29. With apologies to my non-tort, contract-teaching colleagues.

30. 156 Eng. Rep. 145 (1854).

31. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

32. The movie was made and distributed by former law students. In prior years, law schools could rent the movie for $65.20 from Martin Schneider of Brooklyn.

33. Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954). At least the court notes the contribution of *Barber*. *See id.* at 101-02.

34. *See, e.g.*, CRAMTON ET AL., *supra* note 26, at 117, 130, 131, 165; WEINTRAUB, *supra* note 22, at 48, 379, 381.

35. *See* Solimine, *supra* note 26, at 782-89.

36. Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963).

37. Emery v. Emery, 289 P.2d 218 (Cal. 1955); Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953).

38. Haumschild v. Continental Casualty Co., 95 N.W.2d 814 (Wis. 1959).

39. It has been said that tort reform wars are being fought on conflict of laws battlegrounds. Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 327 & n.120 (1994). *See also* JUENGER, CHOICE OF LAW, *supra* note 28, at 118 & n.724 & n.1187. *See* WEINTRAUB, *supra* note 22, § 6.9 at 294 n.44 (noting the causal relationship between conflicts

course, if Congress is successful in enacting comprehensive federal "tort reform," conflicts battles may be fewer.

When one thinks of innovative state supreme courts over the last few decades, it is common to name the New York Court of Appeals, and the California, Oregon, and New Jersey courts. With all due respect to the Indiana Supreme Court, its relative paucity of civil cases, let alone conflict of laws cases in the last fifty years, explained in part by its rules,[40] contributed to the fact that *Barber* is not a conflict of laws household name. Moreover, the *Barber* opinion itself does not indicate the depth and intensity of its break with the past as do opinions like *Babcock*. In fact, *Barber*'s new path is paved initially with citations to vested rights theory so the court does not seem to criticize directly or to undermine significantly that theory.[41] Further, after *Barber*, the Indiana Supreme Court did not again hear a conflict of laws case, save one in 1946 that used the old lex loci approach to torts,[42] for almost forty years.[43] In contrast, the New York Court of Appeals grappled with many conflicts cases during that time. Lastly, as Professor Solimine notes in regard to *Babcock*,[44] we should not underestimate the interconnectedness between the academy and the New York Court of Appeals, a cross-fertilization connection which the Indiana Supreme Court lacked.

Nevertheless, *Barber* did fire the first shot in the judicial choice of law revolution. The next part of this Article will describe the evolution of Indiana choice of law theory since *Barber*.

II. *BARBER*'S PROGENY

Although *Barber* abandoned the traditional choice of law approach in resolving contract issues, the lex loci delicti method, employed in Indiana since 1888,[45] flourished in non-contract cases for another forty-two years after *Barber*. Not until 1987 did the Indiana Supreme Court recognize that "[r]igid application

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methodology and abolition of a guest statute). In very few states will we have guest statutes to kick around anymore. *See* WEINTRAUB, *supra* note 22, at 294.

40. Until recently, the Indiana Supreme Court devoted its resources to hearing criminal appeals. For a thorough history, see Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court*, 63 Ind. L.J. 669 (1988).

41. W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 421 (Ind. 1945).

42. Louisville & Nashville R.R. Co. v. Revlett, 65 N.E.2d 731, 734 (Ind. 1946).

43. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987) (adopting a "significant contacts" approach to be used with lex loci).

44. *See* Solimine, *supra* note 26, at 787-88. For instance, *Babcock* cited a draft of the *Second Restatement* which was authored in part by Willis L.R. Reese—Restatement Reporter and Professor of Law at Columbia. Judge Fuld, *Babcock's* author, graduated from Columbia at the time of Reese's tenure there. *Id.* at 788 n.71.

45. Burns v. Grand Rapids & Indiana R.R. Co., 15 N.E. 230 (Ind. 1888). The only exception, Witherspoon v. Salm, 237 N.E.2d 116, 124 (Ind. Ct. App. 1968), a guest statute case, used a state interest analysis approach, but was reversed on other grounds. Witherspoon v. Salm, 243 N.E.2d 876 (Ind. 1969).

of the traditional rule . . . [might] lead to an anomalous result."[46] In one sense this four-decade hiatus is astonishing. Given the intellectual ferment in choice of law engendered by scholars such as Brainerd Currie (interest analysis),[47] David F. Cavers (principles of preference)[48] and Robert A. Leflar (choice-influencing considerations/"better law"),[49] as well as adoption by several sister states of new choice of law theories, the persistence of lex loci in Indiana is not easily explainable. Perhaps the perceived advantages of the *First Restatement* approach (certainty, predictability, uniformity, and discouragement of forum shopping) gave lex loci its longevity in Indiana and elsewhere,[50] although Currie[51] and some *First Restatement* decisions[52] effectively undercut these asserted advantages.

Nevertheless, in *Hubbard Manufacturing Co. v. Greeson*, the Indiana Supreme Court finally abandoned a strict lex loci approach to choice of law for tort cases.[53] Noting that all states bordering Indiana would not apply Illinois law

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46. *Hubbard*, 515 N.E.2d at 1073. Recall that this was the first choice of law case the court addressed since 1945. *See supra* note 40 and accompanying text.

47. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), *reprinted in* BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963). Currie's policy analysis of conflicting laws and his division of situations into true or false conflicts and disinterested forum cases has been adopted expressly by less than a handful of states. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1995: A Year in Review* 17, Table 3 (Newsletter Version) (1995). Nevertheless, his influence on judicial choice of law has been enormous. Although the majority of states adhere to the most significant relationship test of the *Second Restatement* for torts or contracts, *id.* at 15, they do so in a way that is scarcely distinguishable from a pure Currie governmental interest method.

48. DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

49. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585-88 (1966). Currently, five states use Leflar's method in torts and two use it in contracts. Symeonides, *supra* note 47, at 17, Table 3.

50. A recent count indicates twelve states using lex loci delicti for torts and ten states using lex loci contractus. Symeonides, *supra* note 47, at 13.

51. *See* Currie, *supra* note 47, at 230-51. *But see* Paul v. National Life, 352 S.E.2d 550-51 (W. Va. 1986), where the court rejects emphatically the conflicts of law "playpen" of the last twenty years and reaffirms its commitment to lex loci, with a public policy escape valve. *Id.* at 555. "Having mastered marble, we decline an apprenticeship in bronze." *Id.* at 556.

52. Courts purporting to use the *First Restatement* have resorted to a number of devices to "escape" from what otherwise would be the applicable law. *See, e.g.*, Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955) (exploring the substance/procedural dichotomy of foreign statute of limitations); *In re* Schneider's Estate, 96 N.Y.S.2d 652, 659 (N.Y. Sup. Ct. 1950) (employing renvoi); Levy v. Daniel's U-Drive Auto Renting Co., 143 A. 163 (Conn. 1928) (characterizing the issue as tort rather than contract). *First Restatement* courts have also employed the public policy exception to escape from disfavored law. *See, e.g.*, Kilberg v. Northeast Airlines, 172 N.E.2d 526, 528 (N.Y. 1961) (refusing to apply a sister state's damage cap). The public policy exception has been criticized as a "substitute for analysis." *See* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1016 (1956).

53. 515 N.E.2d 1071 (Ind. 1987).

(as the place of injury), the court found it "anomalous" and "inappropriate" that Indiana would do so.[54] Instead, Chief Justice Shepard said that unless the place of the tort is significant, with the most contacts to the case, the court must examine several factors to see whether the law of the place of injury should apply. If the place of the tort is an insignificant contact, the court should consider the following factors and evaluate them "according to their relative importance to the particular issues being litigated[:]

1) the place where the conduct causing the injury occurred;

2) the residence or place of business of the parties; and

3) the place where the relationship is centered."[55]

Based on the *Hubbard* facts which indicated that the place of tort was "insignificant," the court applied the factors above and concluded that Indiana—the residence of both parties, place of manufacture of the allegedly defective product, and center of the relationship between the defendant and the plaintiff's decedent—had "the more significant relationship and contacts,"[56] therefore compelling the application of Indiana law.[57] Thus, the Indiana Supreme Court joined the ranks of many state courts that had abandoned earlier an approach to choice of law which the United States Supreme Court has called "hoary" and "wooden."[58]

Part III will examine the impact of *Hubbard* on Indiana choice of law and will conclude that the relative infancy of Indiana's "new" conflict of laws approach, as well as its continued emphasis on the presumptive primacy of lex loci, indicates that more conflicts work needs to be done, and it needs to be done with more purposive analysis.

III. *HUBBARD'S* PROGENY

A review of several tort choice of law cases (Appendix, Tables I and II) decided by Indiana state appellate courts and by federal courts employing Indiana choice of law suggests that it is not easy to predict when a court will conclude that the place of the tort is "significant and . . . with the most contacts,"[59] such that its law will apply. The *Bruck* case[60] is an interesting example.

In *Bruck*, the tort occurred in Ohio and the issue concerned the distribution of wrongful death proceeds. In Indiana, no mechanism existed for the distribution

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54. *Id.* at 1073.

55. *Id.* at 1073-74 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971)).

56. *Id.* at 1074.

57. It should be noted that application of Indiana law made it more difficult for the plaintiff to recover. *Id.* at 1073.

58. Allstate Ins. Co. v. Hague, 449 U.S. 302, 316 nn.21 & 22 (1981).

59. *Hubbard*, 515 N.E.2d at 1073.

60. *In re* Estate of Bruck, 632 N.E.2d 745 (Ind. Ct. App. 1994).

of the wrongful death proceeds to certain plaintiffs; Ohio law permitted recovery for survivors other than dependents and spouses, to be distributed equitably. Despite concluding that Ohio, as lex loci, was an insignificant contact and that all but one of the distributees resided in Indiana, the court nevertheless upheld the presumption in favor of lex loci.[61] The court's reasoning is curious. The court noted that "the most relevant factor is the unique legal status of the wrongful death proceeds,"[62] but also stated that the case fell into a "legal lacuna."[63] Moreover, the court went on to analogize to treatise authority which suggested that where a remedy is so closely intertwined with a right that it is inseparable, then the law that created both the right and the remedy ought to be applied.[64] Thus, it is not clear whether the court was really following *Hubbard*,[65] adopting a traditional exception that links remedy and right[66] to escape from otherwise applicable law, employing *sub rosa* a "Better Law"[67] approach by using the more liberal Ohio law, or, in essence, finding no real conflict as there was an "absence of applicable Indiana law."[68]

As students do in Algebra, conflicts courts should "show their work." The court in *Bruck* did not. However, one aspect of *Bruck* is relatively straightforward: the court rejected the decedent's father's attempt to persuade the court to adopt a *Second Restatement* approach and apply Indiana law as "'the state of domicile of the decedent and the beneficiaries.'"[69] Interestingly, under *Hubbard*, a very good argument could be made to support the application of Indiana, rather than Ohio law, because Ohio's connection to the disputed issue was negligible.

In contrast, when the place of the tort lacks a significant relationship to the

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61. *Id.* at 748.

62. *Id.*

63. *Id.*

64. *Id.* at 749 (citing 15A C.J.S. *Conflict of Laws* § 9 (1967)).

65. *Id.* at 747 (citing Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1073 (Ind. 1987)).

66. *See, e.g.*, The Harrisburg, 119 U.S. 199, 214 (1886).

67. *See supra* note 49.

68. *Bruck*, 632 N.E.2d at 746. Arguably, the court's application of Ohio law as the place of injury, when Ohio admittedly had no significant contacts with the case, is unconstitutional under Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), and Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Ohio seems to lack "a significant contact or significant aggregation of contacts, creating [Ohio] interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate*, 449 U.S. at 313. Ohio's only connection to the distribution of the wrongful death proceeds is that it is the place of injury, while Indiana is the residence of all but one of the distributees. Under *Hague* and *Shutts*, therefore, application of Ohio law may violate the Due Process Clause, U.S. CONST. amend. XIV, and the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1.

69. *Bruck*, 632 N.E.2d at 747 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 177 cmt. B (1971)).

case, several Indiana[70] and federal courts,[71] unlike *Bruck*, refuse to apply its law. For example, in *Gollnick v. Gollnick*[72] an Indiana car accident led to a suit by a child against her father—both California domiciliaries. Because California had an interest in the integrity of familial relationships and Indiana, the place of injury, was not a significant contact, the court refused to apply Indiana law.[73] Similarly, in *Autocephalous Greek Orthodox Church v. Goldberg*, although the tort occurred in Switzerland, the federal district court applied Indiana law.[74] In *Goldberg*, a foreign plaintiff sued a fine arts corporation and the buyer of the mosaics that were allegedly stolen from the plaintiff. Although the court found that the buyer took possession of the mosaics in Switzerland and that, therefore, the tort occurred in Switzerland, the court held the Swiss contacts insignificant.[75] Indiana was the buyer's domicile, the principal place of business of the corporation that purchased the mosaics, the situs of the art dealer's efforts to assist in the purchase, the state from which financing was obtained, and the location of the mosaics at the time of suit. Moreover, several Indiana residents held an interest in any profits arising from resale of the mosaics.[76]

An examination of Indiana choice of law cases since *Hubbard* leaves the reader with a feeling of unease. Most cases do not explain fully *why* the place of tort does or does not bear a significant connection to the case.[77] Instead, the courts seem to be contact-counting, without furnishing an adequate method to determine the weight or priority of certain contacts compared to other contacts. Although *Hubbard* teaches that certain *Second Restatement* factors "should be evaluated according to their relative importance to the particular issues being litigated,"[78] few courts have done so.[79] This may be due, in part, to the relative youth of Indiana's "modern" choice of law approach to torts (1987 to present), or it may follow from the nature of the presumptive rules of the *Second Restatement* itself which, unlike

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70. *See, e.g.*, Hoffman v. Roberto, 578 N.E.2d 701 (Ind. Ct. App. 1991); Thomas v. Whiteford Nat'l Lease, 580 N.E.2d 717 (Ind. Ct. App. 1991); Gollnick v. Gollnick, 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd*, 539 N.E.2d 3 (Ind. 1989).

71. *See, e.g.*, Autocephalous Greek Orthodox Church v. Goldberg, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

72. 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd*, 539 N.E.2d 3 (Ind. 1989).

73. *Id.* at 1258-59.

74. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

75. *Id.*

76. *Id.* at 1394.

77. *Gollnick* is an exception. It notes that California, the place of the family's domicile, has an interest in an intrafamily tort suit which Indiana lacks. *Gollnick*, 517 N.E.2d at 1259.

78. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1074 (Ind. 1987). This language tracks the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971), although *Hubbard* does not quote it.

79. *See supra* note 77. *See also* Jean v. Dugan, 20 F.3d 255, 261-62 (7th Cir. 1994), finding that in a defamation action plaintiff's domicile and place of employment, Indiana, was "the relevant community in which the alleged injury to his reputation occurred . . . ."

Currie's interest analysis,[80] does not inquire into the purpose or policy behind the conflicting laws to rationalize their application.[81] Further, neither *Hubbard* nor any Indiana choice of law case since 1987 mentions section 6(2) of the *Second Restatement*, which provides a multi-factor list to serve as a final policy check on otherwise applicable law.[82] Several of these factors urge the courts to focus on policy and state interests.[83] Such analysis might cause a presumptive rule to be dismissed in favor of a law with a tighter and more relevant connection to the disputed issue. Of course, because section 6 lists seven factors with no guidance as to their relative weight, a court may rely on one to tip the balance while another court might emphasize one or more different factors and reach a different conclusion.[84] This decreases predictability by enhancing the opportunity for flexibility and/or manipulation to achieve the desired result.

Whether this is a good development depends upon how one constructs the hierarchy of choice of law goals; should predictability, uniformity, and certainty count more or less than (or equal to) fairness[85] and justice between the parties and/or recognition of significant state interests in the outcome of the litigation. It will be interesting to see how Indiana choice of law juggles these sometimes conflicting principles. The *Second Restatement* itself gives a schizophrenic solution to the "goals" problem. It first directs a court to a host of presumptive rules,[86] thereby worshiping at the altar of predictability, uniformity, and certainty. Second, courts are to test these presumptive rules by reference to general tort or contract principles.[87] Finally, courts must check this answer by way of a "policy" analysis based on a seven factor list.[88] The second and third steps undercut, of

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80. Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), *rev'd*, Marek v. Chesny, 473 U.S. 1 (1985), is a good example of interest analysis. Both the Seventh Circuit opinion and the Supreme Court opinion delve into the purposes behind Fed. R. Civ. P. 68 and 42 U.S.C. § 1988 (1982) to determine whether, in fact, a conflict existed and, if so, how to resolve it.

81. Most scholars have been extremely critical both of the "center of gravity" approach, which preceded the *Second Restatement*, and the *Second Restatement*. *See* CRAMTON ET AL., *supra* note 26, at 132-33. Nevertheless, judicial acceptance of the *Second Restatement* is widespread; approximately 23 states adhere to its approach. *See* Symeonides, *supra* note 47.

82. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

83. *Id.* §§ (6)(2)(b), (c) & (e).

84. *See, e.g.*, Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 601 P.2d 1369 (Colo. 1979) (emphasizing § 6(2)(c), the policies and interests of the concerned states, and applied New Mexico law); *see also* Walker Adjustment Bureau v. Wood Bros. Homes, Inc., 582 P.2d 1059 (Colo. Ct. App. 1978) (reversing the lower court and emphasizing §§ 6(2)(d), (f) & (g), protecting justified expectations, predictability, and ease of application, and applying Colorado law).

85. *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989).

86. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-55, 189-97 (1971).

87. Sections 145 and 188 of the *Restatement (Second) of Conflict of Laws* are to be used when the case involves a tort or contract issue.

88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). For a case illustrating how cumbersome this process can become, especially in an air crash case, see Bryant v. Silverman

course, the putative certainty provided by the first step while attempting to ensure that the law of the state with the most significant relationship will apply. Although the result is an inconsistent blending of jurisdiction-selecting rules (a holdover from the *First Restatement*) and policy analysis, courts have been reluctant to abandon it.[89]

CONCLUSION

Although the Indiana Supreme Court was the first in the nation to abandon the rigid lex locus contractus rule in favor of a "contacts" approach, it took more than forty years for the court to change over to this approach for tort conflict of laws cases. We are still in the first decade after this second revolution in choice of law, and courts (Indiana and federal, applying Indiana choice of law) seem to be unsure of themselves in using the "new" approach which uses lex loci only if the place of the tort bears a significant relationship to the issues disputed in the case.

Hopefully, the revolution begun in 1945 and continued in 1987 will flourish. In the future, Indiana choice of law should focus more closely on the purpose and policy of the conflicting laws and should analyze more explicitly the reasons for choosing the law of one state over that of another.

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703 P.2d 1190 (Ariz. 1985) (applying Arizona law and reversing the trial court's conclusion that Colorado had the most significant relationship).

89. As of November, 1995, the *Restatement Second* (or "significant contacts") approach to torts and contracts conflicts has been adopted by 23 and 29 jurisdictions, respectively, and is the prevalent mode of analysis in this country. *See* Symeonides, *supra* note 47, at 15. Commentators do not react with such warmth. *See* CRAMTON ET AL., *supra* note 26, at 132-33 (quoting, in part, Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 486-87 (1991) ("one needs to read a lot of opinions in a single sitting fully to appreciate just how badly the Second Restatement works in practice . . . [it is] time to abandon this dead-end project in order to channel judges in more productive directions")).

APPENDIX*

TABLE I
Sample Cases — Lex Loci Applicable

	A. Indiana State Cases	Issue	Applicable Law	Place of Injury	Place of Conduct Causing Injury	Plaintiff's Residence	Defendant's Residence	Center of Relationship
1.	*In re* Estate of Bruck[1]	Distribution of wrongful death proceeds	Ohio	Ohio	Ohio	Indiana	Irrelevant	Irrelevant
2.	Bencor v. Harris[2]	Personal Injury/ Defendant immunity	Indiana	Indiana	Indiana	Tennessee	▲ 1—Tennessee ▲ 2—Indiana	Indiana
3.	Tompkins v. Isbell[3]	Plaintiff's negligence	Illinois	Illinois	Illinois	Indiana	Indiana	Illinois
	B. Federal Cases	**Issue**	**Applicable Law**	**Place of Injury**	**Place of Conduct Causing Injury**	**Plaintiff's Residence**	**Defendant's Residence**	**Center of Relationship**
1.	Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Systems, Inc.[4]							
	a. Indiana Plaintiff	Fraud	Indiana	Indiana	Unclear	Indiana	North Carolina	Unclear
	b. Arkansas Plaintiff	Fraud	Arkansas	Arkansas	Unclear	Arkansas	North Carolina	Unclear

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* I thank Jennifer DeYoung for her research assistance in preparation for this Appendix.

[1] 632 N.E.2d 745 (Ind. Ct. App. 1994).

[2] 534 N.E.2d 271 (Ind. Ct. App. 1989) (lex loci "retains some validity" especially where there are significant contacts.) *Id.* at 273.

[3] 543 N.E.2d 680 (Ind. Ct. App. 1989) (Illinois' then applicable pure comparative negligence governs, rather than Indiana's then applicable contributory negligence). *Id.* at 682 & n.1.

[4] 31 F.3d 573 (7th Cir. 1994).

TABLE I (continued)
Sample Cases — Lex Loci Applicable

B. Federal Cases, cont'd

		Issue	Applicable Law	Place of Injury	Place of Conduct Causing Injury	Plaintiff's Residence	Defendant's Residence	Center of Relationship
2.	Jean v. Dugan[5]	Defamation	Indiana	Indiana; Illinois; Iowa	Indiana	Indiana	Illinois	Illinois
3.	Bateman v. Central Foundry Div., GMC[6]	Negligence	Indiana	Indiana	Indiana	Indiana	Delaware	Indiana
4.	Big Rivers Elec. Corp. v. G.E. Co.[7]	Strict liability/ negligence	Kentucky	Kentucky	Kentucky	Kentucky	New York	Kentucky
5.	Stillwell v. Brock Bros.[8]	Indemnification; negligence	Kentucky	Kentucky	Kentucky	Indiana	unclear	Kentucky
6.	Consolidated Rail Corp v. Allied[9] Corp.	Contribution	Indiana	Indiana	Illinois or Indiana	unclear	unclear	unclear
7.	Castelli v. Steele[10]	Medical malpractice	Indiana	Indiana/Illinois	Indiana	Illinois	Indiana	Indiana

[5] 20 F.3d 255 (7th Cir. 1994).

[6] 822 F. Supp. 556 (S.D. Ind. 1992).

[7] 820 F. Supp. 1123 (S.D. Ind. 1992) (both the presumptive lex loci rule and the balancing test lead to application of Kentucky law). *Id.* at 1125.

[8] 736 F. Supp. 201 (S.D. Ind. 1990).

[9] 882 F.2d 254 (7th Cir. 1989).

[10] 700 F. Supp. 449 (S.D. Ind. 1988).

TABLE II

Sample Cases — Lex Loci Not Applicable

A. Indiana State Cases

		Issue	Applicable Law	Place of Injury	Place of Conduct Causing Injury	Plaintiff's Residence	Defendant's Residence	Center of Relationship
1.	Hoffman v. Roberto[1]	Defamation	Michigan	Washington, D.C.; nationwide	Washington, D.C.	Indiana	Ohio	Michigan
2.	Thomas v. Whiteford[2]	Personal Injury	Indiana	Michigan	Michigan	Indiana	Indiana	Indiana
3.	Gollnick v. Gollnick[3]	Intrafamily Immunity	California	Indiana	Indiana	California	California	California

B. Federal Cases

		Issue	Applicable Law	Place of Injury	Place of Conduct Causing Injury	Plaintiff's Residence	Defendant's Residence	Center of Relationship
1.	Autocephalous Greek Orthodox Church v. Goldberg[4]	Art Ownership	Indiana	Switzerland	Switzerland	Cyprus	Indiana	None
2.	Ackerman v. Schwartz[5]	Misrepre-sentation	Indiana	court unable to decide	Michigan Indiana	Indiana/ nationwide	Michigan	Indiana

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[1] 578 N.E.2d 701 (Ind. Ct. App. 1991) (where place of publication occurs simultaneously in more than one state, the place of the tort is insignificant). *Id.* at 705.

[2] 580 N.E.2d 717 (Ind. Ct. App. 1991).

[3] 517 N.E.2d 1257 (Ind. Ct. App. 1988) (place of tort irrelevant in capacity to sue and be sued case). *Id.* at 1258.

[4] 717 F. Supp. 1374 (S.D. Ind. 1989) (Indiana's contacts most significant; alternatively, Swiss choice of law would lead to same result as Indiana law would apply).

[5] 733 F. Supp. 1231 (N.D. Ind. 1989) (place of tort is unclear, but Indiana is center of parties' relationship). *Id.* at 1240.

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